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IN THE

Supreme Court of the United States

October Term, 1968

No. 379

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, INTERNATIONAL TERMINAL OPERATING CO., INC., prays that a writ of certiorari issue to review (a) the judgment of the United States Court of Appeals for the Second Circuit, entered on April 12, 1968, which reversed the judgment of the United States District Court for the Southern District of New York, entered on May 3, 1967, in accordance with a jury verdict dismissing the Respondent's action for indemnity against Petitioner, and (b) the orders of the said Court of Appeals, entered on May 13, 1968, denying application for rehearing and rehearing *in banc*.*

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* The judgment, obtained by the initial plaintiff, ANTHONY ALBANESE, against N. V. NEDERL. AMERIK STOOMV. MAATS. which,

Citations to Opinions Below

The first trial of the personal injury action brought by ANTHONY ALBANESE against N. V. NEDERL. AMERIK STOOMV. MAATS (hereinafter referred to as HOLLAND AMERICA LINE) in which action your Petitioner, INTERNATIONAL TERMINAL OPERATING CO., INC. (hereinafter referred to as I.T.O.), had been impleaded and from whom indemnity had been sought, resulted in a judgment, based upon a jury verdict, in favor of ALBANESE against HOLLAND AMERICA LINE in the sum of $145,000 and dismissing the indemnity action by HOLLAND AMERICA LINE against I.T.O. Said original judgment of the District Court is printed in Petitioner's separate Appendix hereto (p. 1a).

On appeal by HOLLAND AMERICA LINE to the United States Court of Appeals for the Second Circuit, the aforesaid judgment was reversed both insofar as (a) it granted ALBANESE a recovery and (b) it dismissed the indemnity action against I.T.O., and the entire case was remanded for a new trial. The opinion of the Court of Appeals is reported officially at 346 F.2d 481, and is printed in the Appendix hereto (p. 2a).

ALBANESE, HOLLAND AMERICA LINE and I.T.O. all petitioned this Court for the issuance of writs of certiorari. In a *Per Curiam* opinion, reported at 382 U.S. 283, this Court accepted certiorari and reversed the Court of Appeals judgment as to ALBANESE and as to him reinstated the judgment of the District Court. However, it denied the petitions for certiorari by I.T.O. and HOLLAND AMERICA

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with interest totalled $160,497.33, was satisfied by N. V. Nederl. Amerik Stoomv. Matts on February 9, 1966, and Albanese has been, and is, no party to this indemnity action by N. V. NEDERL. AMERIK STOOMV. MAATS against INTERNATIONAL TERMINAL OPERATING CO., INC.

LINE. Rehearing on the denial of I.T.O.'s petition for certiorari was denied at 382 U.S. 1030 and I.T.O.'s motion for leave to file a second petition for a rehearing was denied at 384 U.S. 994.

HOLLAND AMERICA LINE thereafter moved in the Court of Appeals for judgment against I.T.O. as a matter of law. That motion was denied by order of the Court of Appeals entered on March 1, 1966.

HOLLAND AMERICA LINE then moved for summary judgment in the District Court. The memorandum decision of District Judge Tyler, dated October 1, 1966, denying HOLLAND AMERICA LINE'S motion for summary judgment is unreported, and is printed in the Appendix hereto (p. 8a).

A second trial on the indemnity claim by HOLLAND AMERICA LINE against I.T.O. began before District Judge Levet and a jury on April 16, 1967. The jury answered special interrogatories and delivered a general verdict in favor of I.T.O. (Appendix p. 9a). A judgment, based upon said jury's verdict, dismissed the claim of HOLLAND AMERICA LINE against I.T.O. and said judgment was entered in the District Court on May 3, 1967 (Appendix p. 11a).

Thereafter, post trial motions by HOLLAND AMERICA LINE for judgment *non obstante veredicto* and for a new trial were denied by District Judge Levet in an opinion which is printed in the Appendix (p. 12a), and is reported at 279 F. Supp. 635.

The judgment of the District Court was reversed by a 2-1 decision of the Court of Appeals, and both the majority and dissenting opinions are printed in the Appendix (p. 28a) and are reported at 392 F.2d 763.

A petition by I.T.O. for rehearing and rehearing *in banc* was denied by order of the Court of Appeals on May 13, 1968, Appendix (pp. 35a-36a).

Jurisdiction

The judgment of the Court of Appeals was entered on April 12, 1968, Appendix (p. 37a) and a petition for rehearing and rehearing *in banc* was denied by orders entered on May 13, 1968, Appendix (pp. 35a-36a).

This petition for the issuance of a writ of certiorari is being filed within ninety (90) days after the aforesaid denial of the petition for rehearing and rehearing *in banc* on May 13, 1968.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The Questions Presented

Where a jury specifically found in a shipowner's indemnity action against a stevedore (a) that the stevedore continued working only because expressly ordered to do so by the shipowner, and (b) that in so continuing to work the stevedore reasonably relied upon the shipowner's promise to take protective measures against a developing danger, and where the jury returned answers to special interrogatories and a general verdict in favor of the stevedore against the shipowner's claim for indemnity:

(1) Was it an "unjustified usurpation of the function of the jury" (as held by the dissenting opinion in the U.S. Court of Appeals) and a deprivation of the stevedore's constitutional right to a jury trial, for the Court of Appeals to reverse and grant the shipowner indemnity as a matter of law?

(2) Was it error for the Court of Appeals to substitute its own judgment for that of the jury on the

question of whether the continuation at work by the stevedore, under the circumstances, was a breach of the stevedore's implied warranty of workmanlike service?

(3) Was it error for the Court of Appeals to substitute its own judgment as a matter of law for that of the jury which had found as a fact, under a proper charge, that the evidence as to the shipowner's conduct precluded it from recovering indemnity?

Constitutional Provision Involved

UNITED STATES CONSTITUTION, AMENDMENT VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law".

Statement of the Case

At its genesis, this was an action to recover damages for personal injuries, brought by a longshoreman, ANTHONY ALBANESE, against the respondent herein, HOLLAND AMERICA LINE. HOLLAND AMERICA LINE impleaded the Petitioner, I.T.O., seeking indemnity for the latter's alleged breach of the implied warranty of workmanlike service which it owed as a stevedoring contractor. Federal jurisdiction was predicated upon 28 U.S.C. §1332 as ALBANESE was a citizen of New Jersey and HOLLAND AMERICA LINE was a corporation of the Netherlands and the amount in issue exceeded $10,000, exclusive of interest and costs.

The salient facts, in concise form, are that on February 25, 1961 the Petitioner was engaged, pursuant to written contract, in loading steel sheets and tinplate into the #2 hold of the M.S. Schiedyk, a vessel owned and operated by the Respondent. Small gasoline powered vehicles, known as hi-los, were used by the longshoremen to help move and manipulate the heavy cargo which was being loaded and stowed. Ventilation was afforded by the hatch and cowl openings, although the vessel was equipped with a Cargocaire ventilating system which had an air moving and changing capacity of 6,000 cubic feet per minute and which could have completely changed all the air in the #2 hold in less than five minutes time.

The undisputed testimony and proof was that the vessel's Cargocaire ventilating system was under the exclusive operation and control of the ship's officers who would pass upon any request by longshoremen to turn on the system. Significantly, pursuant to stipulation made in open Court by counsel for HOLLAND AMERICA LINE, this Cargocaire ventilating system was adequate within the meaning of Section 9.93 of the Safety and Health Regulation for Longshoring so that Petitioner was not required to bring aboard portable blowers.

There was undisputed testimony from both longshoremen and ship's personnel that up until approximately 11:00 A.M. the working conditions in the hold were good. However, at approximately 11:00 A.M. the longshoremen complained to their hatch boss, Curko, a foreman in the employ of I.T.O., about the air in the hatch becoming foul, and they requested that Curko have the vessel's ventilating system turned on. Curko ascended to the main deck of the vessel and told a ship's mate to turn on the ship's blowers or the longshoremen would stop work. The mate assured Curko that he would turn on the ship's

blowers and he directed Curko to continue working in the #2 hatch. It should be noted at this point that the following special interrogatory was answered in the affirmative by the jury:

> "Has the defendant International proved by a fair preponderance of the credible evidence that a mate or an officer of the vessel, MS Schiedyk, on February 25, 1961 at about 11:00 A.M., told Curko, the hatch boss for International, that he would turn on the ship's blower in the #2 hatch and that the said officer or mate at that time told Curko to proceed with the work in #2 hatch?"

Curko descended into the hold and reported to his men that the mate promised to turn on the ship's blower and wanted them to continue working.

In reliance upon that assurance by the mate, and in compliance with his order, the longshoremen did continue working. It is to be further noted that the jury also answered the following special interrogatory in the affirmative:

> "Has the defendant International proved by a fair preponderance of the credible evidence that on February 25, 1961 International reasonably relied on this promise in proceeding to continue to work in the hold?"

However, after continuing at work for approximately six or seven minutes, Curko realized that the blowers had not been turned on and he again climbed out of the hold to find the mate and ascertain what was happening. He could not find the mate, so he went back to his men and ordered them to stop work and to come up out of the hatch. One of the longshoremen, Anthony Albanese, fell while ascending the ladder to come out of the hatch at that time,

and was found to be suffering from carbon monoxide inhalation. There was no proof, or even a claim, by HOLLAND AMERICA LINE that the hi-los used were in any way defective or giving off excessive fumes.

Nor was there any proof whatever by HOLLAND AMERICA LINE that the atmosphere in the hatch had become unsafe or dangerous prior to 11:00 A.M. when the longshoremen working therein first began to complain.

The basic argument, advanced by HOLLAND AMERICA LINE at the trial, was that in complying with the mate's orders and continuing to work in reliance on the mate's assurance that he would turn on the ship's blowers, I.T.O. breached its implied warranty of workmanlike service.

The jury rejected that contention of HOLLAND AMERICA LINE and, as explained at length by District Judge Levet in his opinion, 279 F. Supp. 635, 637-639, Appendix (p. 12a), determined (a) that there was no breach of warranty by I.T.O., and (b) that in any event the conduct of HOLLAND AMERICA LINE was such as to preclude indemnity even if there were a breach of warranty. The jury's verdict in favor of I.T.O. was incorporated in a judgment which on appeal was reversed by a 2-1 decision of the Court of Appeals which granted HOLLAND AMERICA LINE full indemnity from I.T.O. as a matter of law.

The majority opinion of this divided Court of Appeals quite clearly reexamined the facts, already determined by the jury, and came to a different conclusion. With respect to whether or not I.T.O. had breached its implied warranty of workmanlike service, the Court of Appeals stated, 392 F.2d 763, 765:

> "As we said on the first appeal, when the ship's blowers were not turned on, the stevedore could either have

> stopped work or used its own blowers. It did neither and plainly breached its warranty of workmanlike service".

This is most obviously a factual determination, contrary to that of the jury, which had determined that I.T.O.'s continuation at work for six or seven minutes pursuant to the order of the vessel's mate and in reasonable reliance upon the mate's assurance that he would turn on the ship's blowers did not constitute a breach of warranty.

Respecting the question of whether the conduct of HOLLAND AMERICA LINE's mate (in directing the longshoremen to continue at work, in assuring the longshoremen that he would turn on the ship's blowers, and in failing to turn on the ship's blowers) constituted conduct sufficient to preclude indemnity (which the jury found that it did), the majority opinion of the Court of Appeals held that this conduct was inadequate to preclude indemnity.

The past history of this litigation must also be alluded to as it demonstrates how the action of the Court of Appeals is in conflict with that same Court's prior determination in this very case.

The first trial of this action, containing substantially the same proof as the retrial, resulted in a jury verdict awarding ALBANESE $145,000 against HOLLAND AMERICA LINE and dismissing HOLLAND AMERICA LINE's claim for indemnity against I.T.O. On appeal, 346 F.2d 481, the Court of Appeals reversed both the recovery obtained by ALBANESE and the dismissal of HOLLAND AMERICA LINE's indemnity action, and it remanded the entire matter for a new trial. That reversal of both parts of the case was prompted by errors which the Court of Appeals found in the Trial Court's charge to the jury. However, in remanding the indemnity action for a new trial, the Court of

Appeals rejected HOLLAND AMERICA LINE's contention that it was entitled to indemnity as a matter of law, and held that there were triable issues of fact.

After the judgment in favor of ALBANESE was reinstated by this Court, 382 U.S. 283, and was subsequently satisfied by HOLLAND AMERICA LINE, HOLLAND AMERICA LINE moved in the Court of Appeals for judgment against I.T.O. as a matter of law. That motion was denied by order, without opinion, of the Court of Appeals of March 1, 1966. This was thus a second holding by the Court of Appeals that the indemnity claim contained triable issues of fact. In now reversing a second jury verdict in favor of I.T.O. and in granting HOLLAND AMERICA LINE indemnity as a matter of law, the Court of Appeals acted contrary to its own prior decisions herein and in re-examining the facts and determining the issues as a matter of law performed an "unjustified usurpation of the function of the jury", as cogently stated in the dissenting opinion of Circuit Judge Moore.

REASONS FOR GRANTING THE WRIT

I.

In reversing the judgment of the District Court, the United States Court of Appeals for the Second Circuit has so far departed from the accepted and usual course of judicial proceedings as to require exercise by this Court of its general power of supervision, not only to halt judicial encroachment upon the Constitutionally guaranteed right of trial by jury, but also to preserve the integrity of this Court's decisions in *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 78 S.Ct. 438 and *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines Ltd.*, 369 U.S. 355, 82 S.Ct. 780.

The majority decision of the Court of Appeals in the instant case, reversing the unanimous verdict of impartial jurors, was an arbitrary and unreasonable action, directly contrary not only to the provisions of the Seventh Amendment to the Constitution of the United States, but also directly contrary to the accepted and usual course of judicial proceedings. Indeed, it was contrary to the earlier determination of this matter made by the same Judge who wrote for the majority in both instances, Circuit Judge Smith. The action, taken by the Court of Appeals, was most aptly described in the dissenting opinion of Circuit Judge Moore as "an unjustified usurpation of the function of the jury." By violating the petitioner's constitutionally guaranteed right to a jury trial, the Court of Appeals has taken another step in the gradual process which seems to have the goal of making stevedoring contractors into second-class citizens, juridically speaking. The plight of the stevedore-contractor has been graphically and realis-

tically painted. See dissenting opinion of Brown, *J.*, in *Strachan Shipping Company* v. *Melvin*, 327 F.2d 83, and concurring opinion in *McClendon* v. *Charante Steamship Company*, 348 F.2d 298.

The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, *and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.*" (Emphasis added).

The primary purpose of such amendment is the preservation of the "common law distinction between the province of the Court and that of the jury, whereby, in the absence of express or implied consent, issues of law are resolved by the Court and issues of fact are resolved by the jury under appropriate instructions of the Court", *Baltimore and C. Line* v. *Redman*, 295 U.S. 654, 657 (1935); *Walker* v. *New Mexico & S. P. R. Co.*, 165 U.S. 593, 596 (1897); and *Dimick* v. *Scheidt*, 293 U.S. 474, 476, 485-86 (1935).

There can be no doubt but that the questions of whether a stevedore has breached its implied warranty of workmanlike service and whether a shipowner's conduct is such as would in any event preclude indemnity are issues of fact. For in *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 567, 78 S.Ct. 438, 441, where the facts were that the stevedore contractor built the unsafe winch shelter and used the same for five days although it was obviously unsafe, this Court stated:

> "If in that regard respondent (Stevedore) rendered a substandard performance which lead to foreseeable

> liability of petitioner (shipowner), the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery. The evidence bearing on these issues*—petitioner's action in making the shelter on its ship available to respondent's employees in Boston although it apparently was unsafe, as well as respondent's continued use of the shelter for five days thereafter without inspection—*was for jury consideration under appropriate instructions*". (Emphasis added).

Indeed, the arbitrary and capricious nature of the action taken by the Court of Appeals is heightened by the fact that it had already previously held on the appeal following the first trial of this action that the indemnity claim contained factual issues. In appealing from the first adverse jury verdict against it HOLLAND AMERICA LINE claimed that it was entitled to judgment as a matter of law. Alternatively, it asked for a new trial. In reversing and remanding an indemnity action for a new trial on the basis of what it thought to be an error in the charge, the Court of Appeals (per opinion of Circuit Judge Smith) rejected the argument that indemnity was required as a matter of law and agreed that factual issues were presented. In the course of its opinion 346 F. 2nd 481, 484, the Court said:

> "The jury *could* certainly find that the stevedore did not fulfill his duty of workmanlike service * * *" (Emphasis added)

Quite obviously this language is permissive rather than mandatory and, coupled with its action in rejecting HOLLAND AMERICA LINE's argument that it was entitled to indemnity as a matter of law, is proof that the Court of Appeals (per Circuit Judge Smith) was aware that the in-

demnity action presented triable issues of fact. *Why remand a case for a new trial on the basis of an error in the charge if as a matter of law no issue of fact is involved? Why subject the parties to an expensive exercise in futility in retrying before a jury issues which are not for jury determination?*

In the light of that background, the latest reversal by the Court of Appeals, 392 F.2d 763 (again per Circuit Judge Smith), of a second jury verdict, adverse to HOLLAND AMERICA LINE, and its mandate that HOLLAND AMERICA LINE was entitled to judgment as a matter of law was clearly a violation not only of petitioner's constitutionally protected rights, *but a violation of what this very Court of Appeals knew to be petitioner's constitutionally protected right.*

Now, what rules of the common law does the Seventh Amendment of the Constitution refer to for the reexamination of a jury tried fact.

The only means, known to the common law, to reexamine such facts which are properly tried by the jury are the granting of a new trial by the Court where the issu was tried or the award by an Appellate Court of a *venire facias de novo* for some error of law in the proceedings. *Parsons* v. *Bedford,* 3 Pet. 447, 7 L.Ed. 732. Even the enactment of Rule 50(b) of the Federal Rules of Civil Procedure did not change the sharp delineation between the function of the jury or the function of a Court. Rule 50(b) added nothing of substance to the rights of litigants as they existed theretofore, *Montgomery Ward* v. *Duncan,* 311 U.S. 250. As stated by this Court in *Berry* v. *United States,* 312 U.S. 450, 453:

> "But that rule (Rule 50) has not taken away from juries and given to judges any part of the exclusive power of

> juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law".

A necessary corollary to the Seventh Amendment is that not even an appellate court may substitute its judgment for that of the jury, *Dennis* v. *Denver & Rio Grand Western Railroad Co.*, 375 U.S. 208. Where the evidence is susceptible of different conclusions by reasonable men, the issue must be resolved by the jury, *Scheimann* v. *Grace Line Inc.*, 267 F.2d 596. The function of an Appellate Court vis-a-vis a jury verdict has been well articulated by this Court in *Lavender* v. *Kurn*, 327 U.S. 645 and more recently in *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 110, wherein the following was quoted with approval from *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 412:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable".

Thus, in dealing with the issue of whether the stevedoring services were performed in a workmanlike manner under circumstances where the stevedore, alerted to a potential danger, continued working for six or seven minutes only because it was expressly directed to so continue by the shipowner who also gave assurances that immediate protective and corrective action were being taken, the jury determined as a question of fact that under the *totality of circumstances* it was a workmanlike performance. It was not for the Court of Appeals to substitute its own contrary judgment. Similarly, whether the giving of those

orders and assurances by the shipowner precluded it from recovering indemnity from a stevedore whose fault lay in reasonably relying on the same was also a matter for determination by the jury. Again, it was not for the Court of Appeals to substitute its own judgment for that of the jury.

One would think that the almost on all fours determination by this Court in *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines,* 369 U.S. 355, 82 S.Ct. 780 would have been dispositive of the appeal to the Court of Appeals and have required an affirmance. There, in dealing with a Shipowner's claim for indemnity against a Stevedore, this Court reversed the Court of Appeals, reinstated the judgment of the District Court in accordance with the jury's verdict, and said (p. 358 of 369 U.S., p. 783 of 82 S.Ct.):

> "We might agree with the Court of Appeals had the questions of fact been left to us. But *neither we nor the Court of Appeals can redetermine facts found by the jury* any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law'". (Emphasis added)

This Court further stated (p. 364 of 369 U.S. and p. 786 of 82 S.Ct.:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment" (Citing cases).

Thus, by ignoring well established law which delineates the different functional spheres of a Court and a jury, by its refusal to accept this Court's determinations and decisions that the issues here involved are factual ones for resolution by a jury, by refusing to pay attention to its own earlier determination in this very case that the indemnity issues herein were factual ones to be determined by a jury, and by depriving petitioner of its constitutionally guaranteed right to trial by jury, the Court of Appeals has so far departed from accepted and usual judicial proceedings that this Court should exercise its power of supervision in order to preserve the concept of the rule of law.

II.

The majority decision of the United States Court of Appeals for the Second Circuit is in direct conflict not only with decisions of this Court, but with decisions of the United States Courts of Appeals for the First, Third, Fourth, Fifth and Ninth Circuits; and it is even in conflict with other decisions of the Second Circuit, including a prior decision of that Circuit in this very case.

A. The conflict with this Court.

The conflict between the decision appealed from and the holdings and principles enunciated by this Court is discussed at pages 12-16, *supra,* and no point would be served in repeating the same at length. Suffice it to say that in *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.,* 355 U.S. 563, this Court declared that the questions of whether a Stevedore breached its warranty of workmanlike service and whether a Shipowner's conduct precludes indemnity, are questions *of fact.* The U.S. Court of Appeals

has determined the same in the case at bar to be issues of law.

Further, whereas in *Atlantic and Gulf Stevedores Inc.* v. *Ellerman Lines Ltd.,* 369 U.S. 355, 82 S.Ct. 780, this Court repeated that these are issues of fact on which a Court is not permitted to substitute its own judgment for that of the jury, the U.S. Court of Appeals for the Second Circuit has disregarded completely that principle of law.

Preservation of the integrity of these decisions as well as judicial stability should commend the issuance of a writ herein.

B. The conflict with other Circuits.

Distilled to its essence, the majority opinion of the U.S. Court of Appeals holds that a stevedoring contractor is liable to indemnify a shipowner as a matter of law for continuing to work pursuant to express orders to do so from the shipowner and in reasonable reliance upon certain assurances of safety made by the shipowner. Yet, U.S. Courts of Appeals for every other Circuit which have dealt with comparable factual situations have held such issues to be factual and have affirmed jury verdicts in favor of the Stevedore.

Hudson Steamship Company, Ltd. v. *Colon,* 314 F.2d 44, was decided by the Court of Appeals for the *First Circuit.* On at least three occasions before the accident, the Stevedore, finding a winch defective, had called the Shipowner's attention to the fact. On each occasion the Shipowner did some work on the winch, told the Stevedore that it was repaired, and instructed the Stevedore to resume work. Shortly after the last such repair, the accident occurred. The Shipowner there argued, essentially as the Shipowner here argued, that the Stevedore had the last

clear chance and should be liable for indemnity in continuing to work. The Court held that the Shipowner could not be heard to complain that the Stevedore continued to work, because that continuation at work was based upon the Shipowner's instructions. So, too, in the case at bar.

In *Thompson* v. *Trent Maritime Co.*, 353 F.2d 632 and in *Hodgson* v. *Lloyd Brasileiro Patrimonio Nacional*, 294 F.2d 32, the U. S. Court of Appeals for the *Third Circuit* had occasion to deal with these issues. As it stated in the *Thompson* case:

> "In our case, one of the longshoremen, Bernard Troutman, who was in No. 3 hold on the day Thompson was injured, testified, without being contradicted, that when the condition of the hold was called to the mate's attention, his response was: 'Just leave it lay there. That is all right.' It has been recognized that indemnity may be denied when the shipowner or those operating the vessel participate in some way in the decision to work in an unseaworthy area of the ship or induces the stevedore to go on with the work."

The uncontradicted proof in the case *sub judice* is that the Shipowner directed the Stevedore to continue work in an unseaworthy area of the ship and induced him to continue with the work by assurance that the blowers would be turned on immediately. Clearly, the decision of the U. S. Court of Appeals in our case is in direct conflict with that of the Third Circuit in the *Thompson* case.

Similarly, in the *Hodgson* case, *supra*, the U. S. Court of Appeals for the *Third Circuit* said:

> "*It was for the jury to determine* whether it was unworkmanlike for the stevedoring company to continue operating the winch, which it knew had been defective, after receiving a categorical assurance from the ship-

owner's crew that it was 'O.K.' The same can be said for the shipowner's argument that the stevedoring company, even before the accident, knew that the winch was defective and that efforts at repair had been unsuccessful. *At most, it can be said that these are questions over which reasonable men could differ, and that, as such, they were properly referred to the jury*". (Emphasis added)

In the *Fourth Circuit, Moore-McCormack Lines, Inc.* v. *Maryland Ship Ceiling Co.*, 311 F. 2nd 663, presented a factual situation virtually identical to the one here presented. There, as here, a ship was unseaworthy because of the presence of noxious gas which the contractor employing the injured plaintiff had reported to the ships' officer as soon as it was known. The ship's officer told the contractor's foreman, as here, that it was all right to continue working in the area, and the jury specifically found that the contractor acted with due care in relying on the statement of the ship's officer. It was held that under those circumstances the indemnity issues of whether the contractor performed in a workmanlike manner and whether the shipowner's conduct precluded indemnity were factual ones for the jury. Such holding is in square conflict with the holding of the majority opinion in this case.

The *Fifth Circuit* had an opportunity to pass upon the issue here presented in *Compagnie Anonima* v. *Matthews*, 371 F.2d 971, and in *Waterman Steamship Corporation* v. *David*, 353 F.2d 660. In the *Matthews* case an unseaworthy condition consisted of excess dunnage which cluttered the working area in the hold. That condition became known to the stevedore who requested the vessel's mate to remove the dunnage. The mate insisted the dunnage remain and directed the stevedore to work over it. The Court held that indemnity may and should be denied when the Shipowner

or those operating the vessel learned of the conditions under which work was to be performed and ordered the Stevedore to proceed with work under those conditions. It affirmed a judgment denying the Shipowner indemnity on the grounds that its conduct in directing the Stevedore to continue at work was such as to preclude recovery of indemnity. Again, a square conflict with the majority opinion in the instant case.

In the *Waterman* case, *supra,* the U. S. Court of Appeals for the *Fifth Circuit* held that resolution of the indemnity issues would involve a *weighing process by the fact finder.*

And, in the *Ninth Circuit* is to be found the decision of *United States* v. *Harrison,* 245 F.2d 911, wherein a Shipowner, who directed a Stevedore to continue working, notwithstanding the presence of oil on the floor of the work area, was denied indemnity.

Thus, in every other Circuit wherein the issues here presented have been considered, there have been decisions opposite to and in conflict with that of the majority opinion of the U. S. Court of Appeals for the Second Circuit in the instant case.

It is respectfully submitted that the solitary and markedly different position taken by the Court of Appeals herein from that of all other Courts of Appeals, which considered these issues, warrants attention by this Court.

C. The decision conflicts squarely with an earlier decision by the United States Court of Appeals for the Second Circuit in this same case and also conflicts in principle with other decisions of that same Court.

As discussed *supra,* the first decision of the U. S. Court of Appeals was on Shipowner's appeal from the first adverse jury determination, and the U. S. Court of Appeals

there held that the indemnity issue presented issues of fact on which it ordered a retrial, 346 F.2d 481. Lo and behold, following the retrial of that same issue, which again resulted in a jury verdict in favor of the Stevedore, a divided U. S. Court of Appeals (with the same Circuit Judge writing the majority opinion) now declares that the issues are not factual and substitutes its own judgment for that of the jury and awards the shipowner indemnity. As stated in the dissenting opinion of Circuit Judge Moore:

> "The entry of judgment notwithstanding the verdict (*and the overruling of this court's prior determination that there was a triable issue on essentially the same facts as are before us now*) is in my opinion an unjustified usurpation of the function of the jury". (Emphasis added)

In *McNamara* v. *Weichsel Dampschiffahrts ag Kiel, Germany,* 293 F.2d 900, 904, the United States Court of Appeals for the Second Circuit stated:

> "Here there were at least two important *fact questions.* Was there substandard performance of its stevedoring contract by Pittston? Was there conduct by Weichsel sufficient to bar recovery?" (Emphasis added)

How capricious for this same U. S. Court of Appeals to now classify the *identical* questions as issues of law or to determine them as issues of law.

Are all decisions out of step except the one which is sought to be reviewed. If that be the case and the conflicting decisions of this Court, of other Circuit Courts, and of the Second Circuit itself, are in error, then this Court should grant certiorari so as to accomplish the needed change in the law and lay down the guidelines for Courts which look to this Court for instruction and guidance. If,

on the other hand, the decision, sought to be reviewed, errs in its conflict with all the other aforesaid decisions, then certiorari should be granted so that such conflict can be terminated immediately.

III.

Resolution of the questions, presented herein, is of paramount importance not only so that there may be uniformity in the administration of Maritime Law, but for the survival of the stevedoring industry in other than a monopolistic form.

The rights of parties under Maritime Law are not dependent upon the courthouse in which the action is instituted. *Pope & Talbot* v. *Hawn,* 346 U.S. 406, 74 S.Ct. 202. The dispensation of equal justice under Maritime Law requires that the administration of that law be uniform throughout the country. The correlative rights and obligations of a Shipowner and a Stevedore in the Ninth Circuit should be the same as those of a Shipowner and a Stevedore located within the geographical confines of the Second Circuit. Thus, the resolution of the conflict above outlined between the Second Circuit and the various other Circuits, which have considered the issues here involved, is a matter of particular importance in the maritime field where nationwide uniformity is so much to be desired.

It must be further appreciated that when the decision under consideration is translated into practical, every day, waterfront meaning, it in effect says to the stevedoring industry: Even when you do your work exactly as your customer, the shipowner, directs, you must nonetheless indemnify that shipowner for any accident which results in obeying his orders. This is, of course, tantamount to say-

ing to the stevedoring industry that it is an insurer of the shipowner for accidents occurring aboard ship.

As this Court will readily appreciate from the very nature of the business, stevedoring contractors are basically purveyors of labor. Few, if any, possess the wealth and assets which can withstand the legal assaults such as that made by the Court below. Manifestly, protection against such ever widening and expanding liability must be sought from the insurance industry. Yet, it is axiomatic that as the potential liability increases, the premium charge for the same also increases. Indeed, the insurance premium charge to one Stevedoring company for the basic protection of longshoremen's compensation claims and shipowner's actions for indemnity is now reputed to equal 45 to 50% of the payroll of that company.

The end result of this spiraling process of ever increasing the legal liability of the stevedores, thereby compelling it to obtain insurance at ever increasing rates, has been to drive the majority of those companies out of business and to leave surviving only those few who possess an infallible degree of expertise, or a willingness, backed by sufficient wealth, to become an insurer.

Within the past few years in the Port of New York alone, many venerable stevedoring firms have gone out of business, including—

American Stevedores Inc.
Turner and Blanchard, Inc.
Maude James Inc.
T. Hogan & Sons
John T. Clark & Son
Atlantic Stevedoring Co.
Commercial Stevedoring Company

Nessa Corp. and
Jules Sottnek Co. Inc.,

and this is only a partial list.

Such a development in the leading Maritime Port of New York demonstrates the plight of the stevedoring industry, responsive to the death knell tocsin of the judiciary. The pendulum has been pushed too far and a healthy, independent, competitive stevedoring industry cannot survive in a legal climate made up of decisions such as the one under review.

The death of the stevedoring industry must ultimately adversely affect the entire shipping industry and the nation as a whole. Without independent stevedoring firms who stand by with a ready supply of longshoremen to load or discharge vessels which may arrive at any time of the day, how are shipowners going to have their vessels loaded or unloaded? A general decline of the stevedoring and shipping industries will cause untold harm to those seaboard and Gulf States which have been for so long so heavily dependent upon maritime commerce.

Undoubtedly, many petitions for certiorari paint dire pictures of what will occur if certiorari does not issue and the error corrected. In this case, however, the dire picture is supported by the general decline of shipping in the Port of New York and the decline in that port of a stevedoring industry to the point where only four or five independent stevedoring contractors now exist where more than thrice that number had flourished.

CONCLUSION

The issues, involved here, are of national importanc
the stevedoring and shipping industry. The decision of
U.S. Court of Appeals is a major departure from the
ings of this Court and is similarly in direct conflict
the decisions of each of the other U.S. Courts of App
which have resolved the same issues.

The decision under attack constitutes a sharp ero
of the Constitutional mandate that "no fact tried b
jury, shall be otherwise reexamined in any Court of
United States, than according to the rules of common l
Further invasion of constitutionally protected rights
follow unless this decision is reversed.

Surely a decision which presents such a danger to
vital industries of this country and which at the same
is in conflict with decisions of this Court and decis
of all other Circuit Courts which have previously de
mined the same issues, and which at the same time viol
constitutionally protected rights, is a decision which sh
be reviewed by this Court.

Respectfully submitted,

SIDNEY A. SCHWA
Attorney for Petiti

JOSEPH ARTHUR COHEN
Of Counsel

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 379

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Judgment of the District Court After First Trial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The issues in the above entitled proceeding having been brought on regularly for trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury on April 7, 8, 9, 10, 13, 14, 15, 16, 1964, and the jury having rendered a verdict in favor of the plaintiff in the sum of $145,000.00 against the defendant, and also in favor of the third party defendant against the defendant, and the Court having granted defendant 20 days to file all motions and a new trial, it is

ADJUDGED that the plaintiff, Anthony Albanese have judgment against the defendant, N. V. Nederl. Amerik Stoomv. Maats., in the sum of $145,000.00, and it is further

ADJUDGED that the third party defendant, International Terminal Operating Co. Inc., having judgment against the defendant, N. V. Nerderl. Amerik Stoomv. Maats., dismissing the third party complaint.

Dated: New York, N.Y.
April 17, 1964.

/s/ James E. Valeche
Clerk.

Opinion of the Court of Appeals on First Appeal (346 F. 2d 481)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

(Argued Dec. 3, 1964 Revised Opinion June 15, 1965.)

No, 212, Docket 29155

ANTHONY ALBANESE,

Plaintiff-Appellee,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant-Appellant and Third Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

ROBERT KLONSKY, Brooklyn, N. Y. (Philip F. DiCostanzo, Brooklyn, on the brief), DICOSTANZO, KLONSKY & SERGI, Brooklyn, N. Y., *for plaintiff-appellee.*

Opinion of the Court of Appeals on First Appeal
(346 F. 2d 481)

EDMUND F. LAMB, New York City (Purdy, Lamb & Catoggio, William E. Fay III, New York City, of counsel to Schaffner & Furey, New York City, on the brief), *for defendant-appellant and third-party plaintiff-appellant.*

JOSEPH ARTHUR COHEN, New York City (Alexander, Ash & Schwartz, and Sidney A. Schwartz, New York City, on the brief), *for third-party defendant-appellee.*

Before:

FRIENDLY and SMITH,
Circuit Judges,

and BLUMENFELD,
*District Judge.**

SMITH, *Circuit Judge.*

Albanese, a longshoreman in the employ of stevedore International Terminal Operating Co., Inc., injured by monoxide gas fumes while working in the hold of the vessel M. S. Schiedyk, owned by N. V. Nederl., brought action for damages against the shipowner, which impleaded I. T. O. as third party defendant. After trial to the jury in the United States District Court for the Southern District of New York, Irving Ben Cooper, Judge, judgment was entered on verdict in favor of plaintiff against N. V. Nederl. and in favor of the stevedore dismissing the third party complaint, and N. V. Nederl. appeals. We find error in the charge on the principal action and on the claim over, and reverse and remand for new trial.

* Sitting by designation.

Opinion of the Court of Appeals on First Appeal
(346 F. 2d 481)

Plaintiff was a member of a gang of longshoremen working in the lower No. 2 hold of the Schiedyk. From 8:00 a. m. to 10:45 a. m. on the day of plaintiff's injury a gasoline powered hilo owned by I. T. O. was working in this hold. About 10:45 a. m. a second gang began to work in the after half of the upper 'tween deck of No. 2 hold, employing a second hilo. The ship had a ventilating system often used when hilos were working in the holds, which was not turned on on the day in question prior to plaintiff's injury. It was raining and a hatch tent partly covered the upper hatch opening. The hatch between the 'tween deck and the lower hold was partly covered with hatch boards. I. T. O. had portable blowers at the pier, none of which were in use at No. 2 hold. There was evidence that about 10 or 15 minutes after the second gang entered the hold, men complained of fumes from the hilos and the winch operator and signalman at the hatch asked a ship's officer to turn the blowers on. There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed sometime between 11:15 and 11:30 a. m. the blowers had not been turned on and the men left the hatch.

If the hatch bosses some time between 10:55 a. m. and 11:05 a. m. asked a ship's officer to turn on the ship's ventilating system and he agreed to do so, a finding of defendant's negligence would be justified. The charge, however, allowed the jury also to find against the defendant on the basis of negligence (as distinguished from unseaworthiness) even if it did not have actual knowledge of an unsafe condition in the hold, if the jury determined that such a condition existed for a sufficient length of time to charge the shipowner with notice of it and the shipowner did not act to

prevent injury. This was erroneous, for when a shipowner hires a qualified stevedore to load the vessel the standard of due care does not require that he actively supervise the stevedore's work or that he take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist. As pointed out in Berti v. Compagnie de Navigation, etc., 213 F.2d 397, 2 Cir. 1954, to lay down a contrary rule, which on the facts here would mean that mere knowledge of the use of hilos would create a duty on the part of the owner to turn on the ventilators even though he had no knowledge that the hold had become an unsafe place to work, would be to confuse the concept of unseaworthiness with that of negligence. Cf. Filipek v. Moore-McCormack Lines, Inc., 258 F.2d 734, 737, 2 Cir. 1958, cert. den. 359 U.S. 927, 79 S.Ct. 605, 3 L.Ed.2d 629. Contrast Halecki v. United New York and New Jersey Sandy Hook Pilots Association, 282 F.2d 137, 2 Cir. 1960; 302 F.2d 840, 2 Cir. 1962, where the shipowners themselves required the use of the deadly cleaning agent and were held under a duty of care in selecting competent contractors to work with it, or supervising its use.

The jury had been instructed that the owner would be liable, with or without knowledge, if the ship had become unseaworthy because of a dangerous condition created by noxious fumes in the hold. This was correct, and if the verdict was reached on this theory, the verdict against the owner would be sustained, if the trial was otherwise free from error. However, the erroneous charge on negligence may have been the basis of the verdict. The jury's attention was directed in the charge to negligence in the absence of actual notice. Liability, if present in the absence of knowledge in this case, is based not on a duty of care, but on absolute liability for unseaworthiness, actual unfitness of the

vessel for the use to which it is being put. Unfortunately, we cannot tell from the general verdict whether it was based on a finding of unseaworthiness, on a finding of failure to turn on the ventilators after agreeing to do so, or on the erroneous charge on constructive notice as a basis for a finding of lack of care. On the issue of whether an unsafe condition in fact existed, there was evidence of the men's complaints, and of course of plaintiff's injury. This might well have supported a verdict based on unseaworthiness. However, we do not find this evidence so plainly determinative of the issue that it required such a verdict. We cannot, therefore, ignore the instructions on negligence and direct a verdict for plaintiff on the ground of unseaworthiness. In view of the alternative claims here, special interrogatories to the jury might have been helpful in determining the basis of the verdict and the court may well consider their use on retrial.

Another claimed error is the charge that no contributory negligence on the part of the plaintiff had been shown. While the better practice is to let this question go to the jury, LaGuerra v. Brasileiro, 124 F.2d 553, 2 Cir. 1942, we cannot say that the ruling was error in the circumstances of this case where evidence was lacking that Albanese knew of the complaints or appreciated the danger on the day of his injury, or indeed had any real choice of action if he had. There is, however, one other ruling which was erroneous on the proof here. That is the instruction that the Safety and Health Regulations for Longshoring were binding on the shipowner, in spite of the excluding clause of § 9.2(b) and the lack of any testimony as to what the concentration of carbon monoxide in the hold in fact was. Ordinarily, such regulations of stevedoring practices are not relevant to the issues involved in the claim against the shipowner, and

clearly could only confuse the issue here, where, although it was stipulated that the ship's blowers were adequate if used, there was no evidence from which the jury could determine whether the level of gas concentration at which the stevedore was forbidden to work without blowers had in fact been reached.

We find error also in the instructions on the claim over. The jury could certainly find that the stevedore did not fulfill his duty of workmanlike service under his warranty to the owner in permitting the men to continue work in the hold after the stevedore had notice of the conditions in the hold, had requested the blowers to be turned on and the request was not promptly complied with. Nicroli v. Den Norske, 332 F.2d 651, 656, 2 Cir. 1964. The instruction that the request to the ship's officer was sufficient to absolve the stevedore was error. Misurella v. Isthmian Lines, 328 F.2d 40, 2 Cir. 1964. Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough. Misurella, supra. Weyerhaeuser S. S. Co. v. Nacirema Operating Co., Inc., 355 U.S. 563, 567, 78 S.Ct. 438, 2 L.Ed.2d 491. There was no evidence of active "hindrance" by the ship. I. T. O. could either have ordered the men out of the hold when it discovered that conditions were becoming dangerous and the ship's blowers were not turned on, or it could have used its own portable blowers.

The judgment is set aside, on both the complaint and the claim over, and the case is remanded to the District Court for trial.

Memorandum of Decision on Motion for Summary Judgment

October 1, 1966

As I read the history of this litigation, particularly in the Court of Appeals and the Supreme Court, so much of the order of the Court of Appeals dated June 15, 1965 as remands the claim over to this court for a new trial remains in full force and effect. I do not agree with movant's contention here (see pages 3-4 of its brief) that the Court of Appeals ruled at 346 F. 2d 481, 484 that the shipowner may recover from the stevedore as a matter of law.

The motion for summary judgment is denied. It is so ordered.

H. R. Tyler, Jr.
U.S.D.J.

Jury's Answers to Special Interrogatories on the Re-trial

Special Interrogatories for the Jury

(Please answer the following questions. Unanimous agreement is necessary before an answer may be recorded.)

1. Has the defendant International proved by a fair preponderance of the credible evidence that a mate or an officer of the vessel, MS Schiedyk, on February 25, 1961 at about 11:00 A.M., told Curko, the hatch boss for International, that he would turn on the ship's blower in the #2 hatch and that the said officer or mate at that time told Curko to proceed with the work in the #2 hatch?

Yes	No
√	

If your answer is "Yes," proceed to Question #2.

2. Has the defendant International proved by a fair preponderance of the credible evidence that on February 25, 1961 International reasonably relied on this promise in proceeding to continue to work in the hold?

Yes	No
√	

(Illegible.)
Juror No. 1

Arthur Taub
Juror No. 2

(Illegible.)
Juror No. 4

Jury's Answers to Special Interrogatories on the Re-trial

William Larkin
Juror No. 3

(Illegible.)
Juror No. 5

Albert Holden, Jr.
Juror No. 9

Michael Katz
Juror No. 6

(Illegible.)
Juror No. 8

Albert F. Terri
Juror No. 10

James J. Corbett
Juror No. 7

James D. McLean
Juror No. 11

James E. Trapp
Juror No. 12

Judgment of the District Court on the Re-trial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

A judgment in favor of the plaintiff as against defendant/third party plaintiff having been previously entered herein, and the issues of the third party claim having been remanded to this Court, and the issues in the said third party claim having come on for retrial before the Honorable Richard H. Levet, United States District Judge and a jury on April 18, 19, 20, 21 and 24, 1967, and the attached interrogatories having been submitted to the jury, and the jury having answered the said interrogatories as indicated thereon, and the jury having returned a verdict in favor of the Third Party defendant as against the defendant/Third Party plaintiff, it is,

ORDERED, ADJUDGED and DECREED: That the Third Party defendant International Terminal Operating Co., Inc., have judgment against the defendant/Third Party plaintiff N. V. Nederl. Amerik Stoomv. Maats., dismissing the third party complaint.

Dated: New York, N.Y.
May 3, 1967

/s/ John J. Olear, Jr.
Clerk.

APPROVED:

/s/ Richard H. Levet
U S D J

Opinion of District Judge Levet on Post Trial Motions
(279 F. Supp. 635)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ 1086

ANTHONY ALBANESE,

Plaintiff,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant.

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Third-Party Plaintiff,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant.

Appearances:

PURDY, LAMB & CATOGGIO,
Of counsel to
SCHAFFNER & FUREY
Attorneys for Third-Party Plaintiff
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EDMUND F. LAMB,
Of Counsel.

Opinion of District Judge Levet on Post Trial Motions (279 F. Supp. 635)

ALEXANDER, ASH & SCHWARTZ
Attorneys for Third-Party Defendant
76 Beaver Street
New York, N. Y.
JOSEPH ARTHUR COHEN,
Of Counsel.

LEVET, *D.J.*

After a verdict by the jury in favor of the third-party defendant, International Terminal Operating Co., Inc. ("ITO"), the third-party plaintiff, N. V. Nederl, Amerik Stoomv. Maats. ("Holland America Line"), has moved to set said verdict aside and for judgment in favor of Holland America Line nothwithstanding the verdict, or, in the alternative, for a new trial.

This claim arises by reason of the fact that the plaintiff, Anthony Albanese, a longshoreman, obtained a verdict and collected a judgment against Holland America Line for the sum of $145,000 by reason of injuries from carbon monoxide fumes while working in his occupation in the hold of the M.S. Schiedyk, owned by Holland America Line. This judgment, with interest and costs, was satisfied for $160,497.33 by Holland America Line.

TRIAL AND APPEALS

This case was originally tried before Judge Cooper with a jury and verdicts returned for Albanese against Holland America Line as defendant and against Holland America Line as third-party plaintiff in favor of ITO as third-party defendant. Holland America Line appealed both verdicts and the Court of Appeals reversed both, 346 F. 2d 481 (2nd

Cir. 1965). Albanese, ITO and Holland America Line all applied for certiorari. In a per curiam opinion, the Supreme Court accepted certiorari and reversed the Court of Appeals decision as to Albanese, but denied the petitions for certiorari by ITO and Holland America Line, 382 U.S. 283 (1965). It denied the petition for a rehearing on the Albanese decision, 382 U.S. 1000 (1966), and denied rehearing on the denial of ITO's petition for certiorari, 382 U.S. 1030 (1966). It also denied ITO's motion for leave to file a second petition for a rehearing, 384 U.S. 994 (1966). The Court of Appeals, however, thereafter refused to withdraw its mandate for a new trial between Holland America Line and ITO.

It is appropriate to point out that the jury verdict on this retrial was in accord with previous determinations.

1. At the first trial, Judge Cooper denied a motion for a directed verdict against ITO (SM 926, first trial);[1]

2. The jury's verdict at the first trial before Judge Cooper was in favor of ITO;

3. Judge Cooper denied a motion of Holland America Line for judgment N.O.V. against ITO;

4. The Court of Appeals of this circuit rejected the argument of Holland America Line that it was entitled to a verdict against ITO as a matter of law, 346 F. 2d 481;

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[1] Numbers in parenthesis, not otherwise identified, refer to pages in the stenographer's minutes of the second trial.

5. The United States Supreme Court denied the cross-petition of Holland America Line for certiorari seeking the same relief, 382 U.S. 283;

6. After reinstatement of the Albanese verdict by the Supreme Court, 382 U.S. 283, Holland America Line argued to the Court of Appeals for the Second Circuit that it was entitled to a judgment as a matter of law; the motion was denied on March 1, 1966;

7. Undaunted, on September 28, 1966, Holland America Line moved for summary judgment before Judge Tyler of the District Court. Judge Tyler denied the motion.

As a result, the claim of Holland America Line against ITO came on for retrial and was heard by court and jury. A verdict for ITO resulted.

THE RETRIAL

At the retrial the jury was instructed to answer "Special Interrogatories" which were as follows:

"SPECIAL INTERROGATORIES FOR THE JURY

(Please answer the following questions. Unanimous agreement is necessary before an answer may be recorded.)

1. Has the defendant International proved by a fair preponderance of the credible evidence that a mate or an officer of the vessel, MS Schiedyk, on February 25, 1961 at about 11:00 A.M., told Curko, the hatch boss for International, that he would turn on the ship's blower in the #2 hatch and that the said officer or

mate at that time told Curko to proceed with the work in the #2 hatch.

....
Yes No

If your answer is "Yes," proceed to Question #2.

2. Has the defendant International proved by a fair preponderance of the credible evidence that on February 25, 1961 International reasonably relied on this promise in proceeding to continue to work in the hold?

....
Yes No"

Counsel for Holland America Line made no objections. (296-98) The jurors were also directed to return a general verdict for plaintiff or for defendant.[2] (398) The jury eventually gave affirmative answers to both questions in the Special Interrogatories. The general verdict was for defendant.

The jury retired to deliberate at 2:58 P.M. (414) At about 4:45 the jury sent in a question reading: "What was the purpose of the special interrogatories as to the jury?" (415) The court instructed the jury:

(a) "These are asked merely for informational purposes to assist the Court."

(b) "These are not the only issues for your consideration; there may be others."

(c) And the court again instructed the jury that a general verdict was also required (416).

[2] The amount was stipulated by the parties.

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After further discussion with counsel about the special Interrogatories (417-18), the court recalled the jurors and instructed them as follows:

> "As the result of certain considerations by the Court of your question, I have decided to tell you this: In the event that you should—I don't say either way on this—if you should come to a determination that there is no breach of the warranty of workmanship and so forth as I explained to you the basic issue was, you find there is no breach, then you need not determine these other questions. If you find, however, that there is a breach, you may determine the interrogatories, the questions which I submitted. I hope that is clear to you. If it isn't write a note to me, Mr. Foreman. You may retire." (418)

At 5:30 P.M. on Friday, April 21, 1967, there being no verdict, I dismissed the jury for the day, with appropriate instructions, and directed the jurors to return for further deliberations on Monday, April 24, 1967. (419) Through certain circumstances, which I narrated to counsel on the 24th and which are delineated in the record, the fact that the jury had already voted upon and signed the Special Interrogatories came to my attention. (420-21) Without telling counsel which way the jury had voted, I fully explained this situation, saying:

> "* * * None of us I believe recognize(d) that the jurors could have already answered the interrogatories and signed the interrogatories on Friday afternoon. For the present, gentlemen, I do not think it is necessary for me to tell you how they voted. As I see it,

that would become significant only if it later appears that the jury tells us that it is deadlocked. * * *

"Now, my idea is that we should leave it as it is, and if any such deadlock situation appears, I will consult with you as to what to do, and I can't think of any other reason in which revelation would be necessary or the lack of it in any way prejudicial. * * *" (421-22)

When the jury returned on April 24th for further deliberation, I reiterated my instructions to them in these words:

"I have asked you to come in [i.e., into the court room] this morning merely in order that I may augment and fill out what I said Friday with respect to the special interrogatories. I tell you now that you need not answer these special interrogatories if you find that the plaintiff has not sustained its burden with respect to a breach of the warranty of workmanlike performance and that the plaintiff as the result has sustained damages; that is, if those two items have not been proved. On the other hand, if you find that the plaintiff has sustained its burden as to these features, then you must go on and consider the affirmative defense and answer the interrogatories." (430)

With respect to the Special Interrogatories, I also stated:

"* * * I sealed the interrogatories and I have kept them in my chambers locked, without any further revelation of any kind. I return these to you, and I merely charge you that if you find that you do not

need, under my instructions, to turn these in, you may seal them in this envelope and return to the clerk when you make your general verdict.

* * *

"The foreman may initial the envelope."' (430-31)

At 11:35 A.M. the jury returned its general verdict for the defendant (431). Then the following proceedings took place:

"The Court: Did you find that the answers were or were not necessary?

"The Foreman: We answered them anyway, your Honor. We had answered them previously. I don't know if that was right, but we had.

"The Court: Well, I was in hopes you had decided whether or not certain things were true. Will the lawyers approach the bench at the side bar.

"(At the side bar.)

"(Discussion off the record.)

"(In open court.)

"The Court: We will ask the foreman to submit the special interrogatories to the clerk.

"Shall I poll the jury as to both the general verdict and the interrogatories?

"Mr. Lamb: I think so, your Honor.

"The Court: Mr. Cohen?

"Mr. Cohen: I don't request it, your Honor.

"The Court: Do you have any objection?

"Mr. Cohen: No, sir.

"The Court: Very well, poll the jury as to the general verdict.

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"The Clerk: Gentlemen of the jury, listen to your verdict as it stands recorded. You say you find a verdict for the defendant?

"(Jury polled and all jurors answered in the affirmative.)

"The Court: Will you also open the special interrogatories and poll the jury on those.

"The Clerk: Gentlemen of the jury, listen to your special interrogatories. Number 1, your verdict is yes. Number 2, yes.

"(Jury polled and all answered in the affirmative.)"

(431-33)

I.

The Effect of the Verdict

The general verdict having been for the defendant and the jury having found by the Special Interrogatories (1) that an officer told the hatch boss that he would turn on the ship's blower in the No. 2 hatch, and (2) that ITO reasonably relied on such promise, I must conclude, since defendant is thus entitled to the most favorable assumptions, that the jury determined (1) that there was no breach of warranty, and (2) that the affirmative defense by ITO was sustained.

II.

The Motion for Judgment N.O.V.

Holland America Line moves for judgment N.O.V. on the ground that the facts relied upon by ITO are insuffi-

cient for a defense as a matter of law. The general rule, however, is that whether a stevedore has breached its warranty of workmanlike performance and whether the shipowner's conduct precludes indemnity are primarily factual, not legal, questions. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 358 (1962); Weyerhaeuser S.S. Co. v. Nacrema Operating Co., 355 U.S. 563, 567-68 (1958); Waterman S.S. Corp. v. David, 353 F. 2d 660, 666 (5th Cir. 1965), cert. denied, 384 U.S. 972 (1966); Parker v. United States, 223 F. Supp. 647, 650 (D. Ore. 1963).

It cannot be said as a matter of law that ITO breached its obligation to perform its work "with reasonable safety," Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 565 (1958), by continuing to work in the hold, when it had reasonable grounds to believe that the ship's ventilation system would be turned on imminently, at least until it appeared that this expectation would not be fulfilled. The verdict of the jury indicates that ITO did not rely on this expectation any longer than was reasonable and such a finding has support in the evidence.

The continuance of the work in pursuance of the orders of the Mate clearly constituted a sound ground for the jury's verdict. Thompson v. Trent Maritime Co., 353 F. 2d 632, 641 (3rd Cir. 1965); Moore-McCormack Lines, Inc. v. Maryland Ship Ceiling Co., 311 F. 2d 663 (4th Cir. 1962); Hodgson v. Lloyd Brasileiro Patrimonio Nacional, 294 F. 2d 32 (3rd Cir. 1961), cert. denied, 369 U.S. 848 (1962); Cf. Delaney v. Towmotor Corp., 339 F. 2d 4, 7 (2nd Cir. 1964). In Thompson, supra, Ganey, Circuit Judge, wrote:

Opinion of District Judge Levet on Post Trial Motions (279 F. Supp. 635)

"• • • It has been recognized that indemnity may be denied when the shipowner or those operating the vessel participate in some way in the decision to work in an unseaworthy area of the ship or induces the stevedore to go on with the work." Hagans v. Farrell Lines, Inc., 237 F. 2d 477 (C.A. 3, 1956); Hodgson v. Lloyd Brasileiro Patrimonio Nacional, 294 F. 2d 32 (C.A. 3, 1961); United States v. Harrison, 245 F. 2d 911 (C.A. 9, 1957). • • •" 353 F. 2d at 641.

Furthermore, the jury was clearly instructed that, to render a verdict for ITO on the ground that the conduct of Holland America Line precluded recovery, they would have to find that such conduct constituted more than merely concurrent fault, but that it prevented or seriously handicapped the stevedore in his ability to do a workmanlike job. The verdict indicates that they did so find as a matter of fact, and the evidence is sufficient to support this finding. In this regard, it is irrelevant that ITO had general control of the stevedoring operations or that it had other means of protecting the longshoremen, because the crucial element was time. ITO did take the protective measure of calling its men out of the hold, but it acted too late, and the cause of its delay was the conduct of Holland America Line's Mate. It was not unreasonable for the jury to find that the statements of the Mate temporarily convinced ITO that protective measures on its part were unnecessary, thus seriously hindering ITO in fulfilling its warranty, and that ITO acted with sufficient promptness when it became apparent that the Mate would not fulfill his promise.

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Such conduct may be profitably analyzed in terms of waiver or equitable estoppel. The ship's mate led the stevedores to believe that the ventilation would be turned on, intending that they should rely on that promise, and, in order to get the ship loaded quickly to the profit of the shipowner, requested or ordered the stevedores to continue working. As the Supreme Court has said:

> "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." Dickerson v. Colgrove, 100 U.S. 578, 580 (1879).

In this case, as the jury specifically found, the Mate clearly induced the stevedores to continue working when the stevedores were prepared to leave the hold, the stevedores relied on the Mate's promise, and their reliance was reasonable. Under such circumstances, it would be inequitable to allow the shipowner to complain now that the stevedore complied with his request and relied on his promise.

None of the authorities cited by Holland America Line are appropriate. No basis for a directed verdict exists. The verdict is not contrary to law or to the evidence.

III.

The Motion for a New Trial

Regulation 9.93 of the Safety and Health Regulations was properly admitted. In Ray v. Compania Naviera Continental, 203 F. Supp. 206, 210 (D.Md. 1962), Judge Watkins stated:

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"• • • The pamphlet constitutes the 'Bible' of the stevedoring industry. Hence the court accepts section 9.25 as defining what is reasonably required in the trade. • • •"

Regulations are at least some evidence of what is good practice. Manning v. Road, 358 F. 2d 615, 618 (5th Cir. 1966); Reid v. Quebec Paper Sales & Transp. Co., 340 F. 2d 34, 35 (2nd Cir. 1965); Provenza v. American Export Lines, Inc., 324 F. 2d 660, 665-66 (4th Cir. 1963), cert. denied, 376 U.S. 952 (1964); Chevis v. Luckenbach Overseas Corp., 228 F. Supp. 642, 649, 651 (E.D. Tex. 1964); Gainar v. S.S. Longview Victory, 226 F. Supp. 912, 914-15 (E.D. Va. 1964), aff'd sub nom. Thornton v. Victory Carriers, Inc., 338 F. 2d 959 (4th Cir. 1964).

With respect to the regulations, the court charged in part:

"These regulations as between these parties—that is, between the ship and a stevedore, are not fully determinative. The mere failure of a ship to test or to turn on the blowers without doing more is not a defense to the stevedore." (375)

With reference to the complaint of Holland America Line as to the admission of statements of the hatch boss to an alleged officer or Mate of the ship, the court charged in part as follows:

"The burden, however, is on the defendant to show that these statements were made, and to show that they were made to an officer, and that the reliance on these statements was reasonably and materially af-

fected the ability of the stevedore to do a workmanlike job." (377)

The conversation was admissible. As pointed out in the discussion of the motion for judgment N.O.V., it is relevant to a valid defense. I must conclude that the jury believed that the person was an officer (see Special Interrogatory No. 1).

Holland America Line argues that it was error to admit the stevedoring contract into evidence. Without reaching the question of relevance, however, it has not shown that it has been prejudiced by the admission. With regard to this and other evidence, it claims that counsel for ITO misled the jury in his closing argument, but counsel for Holland America Line made no objection at that time and he had ample opportunity to rebut such arguments in his own subsequent closing statement.

Holland America Line urges that the court permitted the jury to bring in a verdict inconsistent with the evidence on the prior trial. Obviously, the effect of the first trial, as far as issues between these parties were concerned, was limited. In the charge I stated:

> "As the result of that verdict in favor of Albanese, the following issues may be deemed to have been settled:
>
> "(1) Albanese was injured by reason of carbon monoxide fumes in the lower hold of the No. 2 hatch;
>
> "(2) The source of these fumes was the hi-lo or some people call it the forklift machine used by International in the hold performing services in connection with the loading of the ship;

> "(3) The verdict therefore indicates that the jury concluded that the cause of injuries was the carbon monoxide produced by hi-los in the lower hold of the No. 2 hatch.
>
> "Of course, [the] hi-los concededly were those owned and operated by the defendant.
>
> "However, this verdict did not pass upon the issue of liability except as between Albanese and Holland-America. Nor did it pass upon the liability of International to Holland-America Line by reason of any possible breach of warranty of workmanlike performance, nor did it pass on any defense of International as against Holland-America Line." (379-380)

This was a new trial arising because of determinations on appeal as above stated. Aside from the limitations on issues as above stated, there was no reason to restrict the proof as to relevant issues in the indemnity claim. No testimony inconsistent with the basic determinations of the first trial was admitted.

Holland America Line also objects to various refusals to charge as requested, particularly with regard to the effect of the verdict at the first trial between Albanese and Holland America Line as defendant. As to this, it should be noted that the doctrine of collateral estoppel applies only to facts and issues necessary to a judgment and not to merely evidentiary facts. Restatement of Judgments § 68, comments o and p, at 309-12 (1942). There has been no showing that any of the facts which the court refused to charge were necessary to the judgment between Albanese and Holland America Line.

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The shipping company appears to argue that the mere fact that the injuries came to Albanese because of fumes from ITO thereby demands indemnity to Holland America Line and thus disregards the clear conclusion of the jury at retrial that ITO reasonably relied on the ship to operate the blowers to clear the hold.

On this particular issue, after placing the burden upon ITO to show conduct on the part of the shipowner which would relieve the stevedoring company of its duties under the warranty, I charged:

> "However, it is not enough on the part of the stevedore to show concurrent, that is, at the same time, or simultaneous fault. The conduct of the shipowner must be such as to prevent or seriously handicap the stevedore in its ability to do a workmanlike job." (376-77)

I find no reason to grant a new trial.
Both motions are denied.
So ordered.

Dated: New York, N.Y.
June 9, 1967.

RICHARD H. LEVET
United States District Judge

Opinion of the Court of Appeals on the Second Appeal (392 F.2d 763)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 186—September Term, 1967.

(Argued November 27, 1967 Decided April 12, 1968.)

Docket No. 31702

ANTHONY ALBANESE,

Plaintiff,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant and Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Respondent.

Before:

MOORE, SMITH and HAYS,

Circuit Judges.

Appeal from judgment on jury verdict in favor of stevedore on shipowner's third party claim to recover amounts paid and incurred by shipowner for injury to longshoreman, in the United States District Court for the Southern District of New York, Richard H. Levet, *Judge.*

Reversed with direction to enter judgment for shipowner.

Opinion of the Court of Appeals on the Second Appeal (392 F.2d 763)

EDMUND F. LAMB, New York, N. Y. (Purdy, Lamb & Catoggio, of counsel to Schaffner and Furey, New York, N. Y., on the brief), *for defendant and third-party plaintiff-appellant.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Sidney A. Schwartz, and Alexander, Ash & Schwartz, New York, N. Y., on the brief), *for third-party defendant-respondent.*

SMITH, *Circuit Judge*:

This is an appeal by Holland American Lines, a third party plaintiff shipowner from a judgment dismissing after jury verdict third party claim for indemnification by stevedore for amount paid in satisfaction of judgment on personal injury claim of longshoreman, in the United States District Court for the Southern District of New York, Richard H. Levet, *Judge*. We find error in denial of a motion for judgment n.o.v. and reverse for entry of judgment for the shipowner.

One Albanese, a longshoreman employed by third party defendant International Terminal Operating Co., Inc., a stevedore, was injured by carbon monoxide inhalation while working in the lower hold of Holland American's ship. On trial in the United States District Court for the Southern District of New York, judgment entered in favor of Albanese against Holland American, and against Holland American on its claim over against I. T. O. This court reversed and remanded with respect both to the longshoreman's claim and the shipowner's third party claim. 346 F. 2d 481 (2 Cir.). The Supreme Court reversed reinstat-

ing the judgment in favor of the plaintiff Albanese because it held this court in error in holding the charge on negligence erroneous. 382 U. S. 283 (1965). On retrial of Holland American's third party claim against I. T. O., judgment was entered by the Court, Richard H. Levet, *Judge,* on a jury verdict in favor of I. T. O., dismissing Holland American's third party claim. Holland American appeals from the judgment and from the denial of its motions for summary judgment, judgment n.o.v., and for a new trial. We find error in the denial of the motion for judgment notwithstanding the verdict and reverse for entry of judgment in favor of Holland American against I. T. O.

The court on retrial considered that two questions were open, whether there was a breach of the warranty of workmanlike service and whether even though the stevedore's conduct breached the warranty it was nevertheless exonerated by the actions of the shipowner. On the evidence here and the opinions of this court and the Supreme Court on the earlier appeal, we think neither presented a jury question.

We had held in effect that the shipowner was not to be cast in negligence without actual notice of an unsafe condition, since he was not required actively to supervise the work of a competent stevedore hired to do the work. Citing *Gutierrez* v. *Waterman SS Corp.,* 373 U. S. 206 (1963), the Supreme Court reversed. We take this to mean that regardless of the shipowner's control or lack of it, he still has a nondelegable duty to use reasonable care to keep the area a safe one in which to work. In the circumstances shown by the evidence here, the injury was caused by the unsafe and unseaworthy condition in the hold, failure to correct which under the ruling of the Supreme Court the jury could find to be negligence on the part of the ship-

owner as well as unseaworthiness. But whichever theory the jury adopted in the first trial here, the creation of the condition was the act of the stevedore and breached his warranty of workmanlike service.

Here the stevedore not only knew of the dangerous condition, fumes in the hold, but created it by adding the second hi-lo to the one already operating without using blowers. Whether evidence to contradict the absence of blowers testified to in the first trial should have been admitted is questionable. *Caputo* v. *U. S. Lines,* 311 F. 2d 413 (2 Cir.), cert. denied sub nom. *Imparato Stevedoring Corp.* v. *U. S. Lines Co.,* 374 U. S. 833 (1963). In any case, there was no evidence that they were in use at the time of Albanese's injury, but only testimony by Jerkovich in his deposition that they were present and working at some uncertain time that morning. Even if the jury credited this item from Jerkovich's deposition in spite of his other inconsistent statements and the great amount of testimony that I.T.O. never did have blowers aboard, it could not support a finding that they were in operation at the significant time. At best, I. T. O. had blowers available, and gas testing equipment available, used neither at the time of the injury, allowed conditions to become unsafe, and continued to work the men. As we said on the first appeal, when the ship's blowers were not turned on, the stevedore could either have stopped work or used its own blowers. It did neither and plainly breached its warranty of workmanlike service. *Mosley* v. *Cia Mar. Adra S.A.,* 362 F. 2d 118 (2 Cir.), cert. denied 385 U. S. 933 (1966). See also *Nicroli* v. *Den Norske Afrika, etc.,* 332 F. 2d 651 (2 Cir. 1964); *Misurella* v. *Isthmian Lines,* 328 F. 2d 40 (2 Cir. 1964); *DeGioia* v. *United States Lines Co.,* 304 F. 2d 421 (2 Cir. 1962).

Opinion of the Court of Appeals on the Second Appeal (392 F.2d 763)

The court denied the motion for directed verdict and the motion post trial for judgment n.o.v. in part because of the continuance of the work in pursuance of the orders of the mate, quoting Judge Ganey in *Thompson* v. *Trent Maritime Co.*, 353 F. 2d 632, 641 (3 Cir. 1965), "It has been recognized that indemnity may be denied when the shipowner or those operating the vessel participate in some way in the decision to work in an unseaworthy area of the ship or induces the stevedore to go on with the work." This ruling was consistent with the charge which allowed the jury to find for the defendant if the conversation with the ship's officer took place and the stevedore boss Curko reasonably relied on it. We think that this misconstrued the decision of this court on the first appeal in this case. We there recognized that the exact requirements for exoneration because of actions of the ship may not yet be fixed by the cases, but held that merely concurrent fault is not enough, and held, as we later reiterated in *Mortensen* v. *A/S Glittre*, 348 F. 2d 383 (2 Cir. 1965) that a shipowner's conduct to exonerate the stevedore "must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job." Citing *Misurella* v. *Isthmian Lines, supra,* we held erroneous an instruction that the request to the ship's officer was sufficient to absolve the stevedore, and pointed out that there was no evidence of active "hindrance" by the ship. We can find nothing added here that should change that determination. The evidence was therefore insufficient to go to the jury on the question of exoneration, and the shipowner was entitled to judgment notwithstanding the verdict.

This is as it should be, for the stevedore is in direct charge of the work and is best able to control it so as to avoid serious damage from unsafe conditions by either

shutting down the job until the conditions are corrected or using its own means to correct them, and under the decisions of the Supreme Court from *Ryan* v. *Pan-Atlantic SS Co.*, 350 U. S. 124 (1955) through *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964),[1] this is precisely what the stevedore has impliedly warranted to do.

The judgment is reversed and remanded to the district court with instructions to enter judgment in favor of the third party plaintiff against the third party defendant in the amount of $160,497.33 with interest from February 9, 1966 plus reasonable attorneys' fees incurred by the third party plaintiff in defense against the claim of Albanese, and costs.

MOORE, *Circuit Judge* (dissenting):

After reinstatement of the Albanese verdict by the Supreme Court, 382 U. S. 283 (1965), Holland America argued to this court that it was entitled to judgment against I. T. O. as a matter of law. That motion was denied on March 1, 1966, determining that there was an issue of fact to be resolved.

---

[1] "liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury." 376 U. S. at 324.

"'The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved.' *De Gioia* v. *United States Lines*, 304 F. 2d 421, 426 (C. A. 2d Cir.). And see *Ferrigno* v. *Ocean Transport Ltd.*, 309 F. 2d 445 (C. A. 2d Cir.)." 376 U. S. at 323, n. 10.

Specifically, Holland America had to prove on the retrial of the indemnity claim that its liability was proximately caused by a breach of warranty of workmanlike service on the part of I. T. O. From the evidence on the retrial, the jury could have found that I. T. O. did not breach its warranty or act unreasonably. The ship was equipped with a Cargocaire ventilation system that was admitted to be adequate for ventilation of the hold where the hi-los were operating, and the stevedore could certainly have been found to be justified in waiting a few minutes before ordering the men out in the expectation that the ship's blowers would be turned on.

I. T. O. would not be relieved of liability simply because it told a ship's officer to turn on the blowers. Instant case, 346 F. 2d at 484. See also *Mortensen* v. *A/S Glittre,* 348 F. 2d 383 (2d Cir. 1965). But I. T. O. should not be held liable merely because its machines were producing fumes, without regard to whether the ship had an adequate ventilation system that could be expected to be in operation. Since such a system existed, and since the jury has decided that it was reasonable for I. T. O. to rely momentarily on its being turned on, any failure on the part of I. T. O. to use its testing equipment or portable blowers is irrelevant. This is not to say that a jury verdict for Holland America was required by the evidence, but only that the jury's decision should not be disturbed. The entry of judgment notwithstanding the verdict (and the overruling of this court's prior determination that there was a triable issue on essentially the same facts as are before us now) is in my opinion an unjustified usurpation of the function of the jury.

Order of Court of Appeals Denying Rehearing of Second Appeal

31702

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

ANTHONY ALBANESE,

Plaintiff,

—v.—

N. V. NEDERL AMERIK STOOMV. MAATS.,

Defendant and Third-Party Plaintiff-Appellant,

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is

Denied

/s/ Leonard P. Moore
/s/ J. Joseph Smith
/s/ Paul R. Hays

Circuit Judges

May 13, 1968

Order of Court of Appeals Denying Rehearing in Banc of Second Appeal

31702

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

[SAME TITLE]

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ J. EDWARD LUMBARD
Chief Judge

May 13, 1968

Judgment of Court of Appeals on Second Appeal

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of April one thousand nine hundred and sixty-eight.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,

Circuit Judges.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded with instructions to enter judg-

ment in favor of the defendant and third-party plaintiff-appellant N. V. Nederl Amerik Stoomv. Maats. against the third-party defendant-appellee in accordance with the opinion of this Court, with costs to defendant and third-party plaintiff-appellant N. V. Nederl Amerik Stoomv. Maats.

A. Daniel Fusaro
Clerk

A true copy.
/s/A. Daniel Fusaro
Clerk

Judgment of District Court Following Second Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

An appeal having been taken by defendant and third party plaintiff, N. V. NEDERL AMERIK STOOMV. MAATS., to United States Court of Appeals for the Second Circuit from the judgment of this Court entered herein on the third day of May, 1967 in favor of third party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., against the defendant and third party plaintiff, N. V. Nederl Amerik Stoomv. Maats., dismissing the third party complaint, and the United States Court of Appeals having rendered its mandate filed herein on the 16th day of May, 1968, reversing the aforesaid judgment of this Court and ordering, adjudging and decreeing that the action be and it is hereby remanded to this Court with instructions to enter judgment in favor of the defendant and third party plaintiff-appellant, N. V. Nederl Amerik Stoomv. Maats., against the third party defendant-appellee in accordance with the opinion of the United States Court of Appeals for the Second Circuit rendered on said appeal, with costs to defendant and third party plaintiff-appellant, N. V. Nederl Amerik Stoomv. Maats., and it appearing from the opinion of the United States Court of Appeals for the Second Circuit that the judgment appealed from is reversed and remanded to the District Court with instructions to enter judgment in favor of the third party plaintiff against the third party defendant in the amount of $160,497.33 with interest from

Judgment of District Court Following Second Appeal

February 9, 1966, plus reasonable attorneys' fees incurred by the third-party plaintiff in defense against the claim of Albanese, and interest on the aforesaid sum of $160,497.33 from February 9, 1966 having been computed to be in the amount of $21,827.63 it is,

ORDERED, ADJUDGED AND DECREED: That third-party plaintiff, N. V. Nederl Amerik Stoomv. Maats., have judgment against the third-party defendant, International Terminal Operating Co. Inc., in the amount of $182,324.96 plus reasonable attorneys' fees incurred by third-party plaintiff in defense against the claim of the plaintiff, Anthony Albanese, and costs.

Dated: New York, New York
May 28, 1968

/s/ Richard H. Levet,
U.S.D.J.

Judgment entered 5-29-68
/s/ John J. Olear, Jr.
Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 379

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

v.

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent.

BRIEF IN OPPOSITION TO PETITION OF INTERNATIONAL TERMINAL OPERATING CO., INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions

This is a petition by a stevedore from a decision of the Court of Appeals for the Second Circuit reversing and directing judgment n.o.v. in favor of the shipowner against the stevedore upon retrial of a third-party action for indemnity.

The original trial of this action resulted in a verdict in favor of the injured longshoreman plaintiff against the shipowner and in favor of the third-party defendant-stevedore against the shipowner on the shipowner's claim for indemnity. On appeal to the Court of Appeals for the Second Circuit, both verdicts were reversed and a new trial

of the entire case was directed. The opinion of the Court of Appeals on that appeal is reported officially at 346 F. 2d 481 and is printed in the Appendix to the Petition herein.

Upon petitions for certiorari filed both by plaintiff and third-party defendant-stevedore, and a cross petition by third-party plaintiff-shipowner, this Court, in a *per curiam* opinion, reinstated the verdict in favor of the plaintiff but denied the petition for certiorari of the stevedore and the cross petition of the shipowner. The opinion of this Court thereon is reported at 382 U. S. 283. A petition for rehearing of the stevedore's certiorari petition was denied, 382 U. S. 1030, and a subsequent motion of the stevedore for leave to file a second petition for rehearing was also denied, 384 U. S. 994.

The shipowner satisfied plaintiff's judgment on February 9, 1966 and thereupon moved in the Court of Appeals for recall of the mandate of that Court insofar as it directed a new trial of the third-party complaint, to pass upon the question presented on the shipowner's original appeal that it was entitled to judgment of indemnity as a matter of law. The motion was denied on March 1, 1966 without opinion. This motion, however, was not a motion, as stated by Petitioner, for judgment as a matter of law, but merely a motion to recall the mandate so that the Court of Appeals might consider the question.

A subsequent motion by the shipowner for summary judgment on the third-party claim was denied by the District Court in an opinion which is unreported but which is printed in the Appendix to the Petition.

The opinion of the District Court denying shipowner's post-trial motion for judgment n.o.v. or in the alternative for a new trial is reported at 279 F. Supp. 635 and is also printed in the Appendix.

The opinion of the Court of Appeals setting aside the judgment and directing judgment in favor of the ship-

owner on its n.o.v. motion is reported at 392 F. 2d 763 and is also printed in the Appendix. The denial of the subsequent petition of the stevedore in the Court of Appeals for rehearing or rehearing *in banc* is unreported, but the order thereon is printed in the Appendix to the petition herein.

Jurisdiction

It is not disputed that jurisdiction exists under 28 U.S.C. Section 1254 (1). However, the petition presents no new or novel question but reiterates the same arguments and urges the same questions as were originally presented in the petition of the stevedore for certiorari to the first decision of the Court of Appeals herein, and in its petition for rehearing and motion for leave to file a second petition for rehearing.

The petition, it is submitted, fails to set forth sufficient reason for the granting of certiorari under revised Rule 19 of this Court.

The Questions Presented

There is no constitutional issue under the Seventh Amendment involved. All that is really involved is the question; where a longshoreman is injured by carbon monoxide fumes exhausted from hilos employed by a stevedore in performing loading operations aboard a vessel, and the stevedore has in its own possession and under its control means for detecting the carbon monoxide content of the atmosphere and keeping the atmosphere in a safe condition for work, can the stevedore be relieved of the performance of its warranty of workmanlike service by belatedly requesting through subordinate employees that a vessel's forced ventilation system be put into operation after the longshoremen began to complain of the density of fumes within the hold and within less than 15 minutes

of the happening of the injury. This question has twice been answered by the United States Court of Appeals for the Second Circuit in the negative, and this Court has already, on three applications of the Petitioner herein, refused to review the Court of Appeals decision.

Restatement of the Case

Petitioner seeks to state the case involved as if all relevant events occurred between 11 a.m. and a few minutes thereafter on the morning upon which plaintiff sustained his injury, and thus to eliminate from the case all events preceding that moment in time, as if the hazard to the plaintiff for which the shipowner has been held liable suddenly came into being.

The facts upon which the shipowner has been held liable to the plaintiff are succinctly set forth in the first decision of the Court of Appeals herein (346 F. 2d at pp. 482-483, Appendix to Petition p. 4a) as follows:

> "Plaintiff was a member of a gang of longshoremen working in the lower No. 2 hold of the SCHIEDYK. From 8:00 A.M. to 10:45 A.M. on the day of plaintiff's injury a gasoline powered hilo owned by I.T.O. was working in this hold. About 10:45 A.M. a second gang began to work in the after half of the upper 'tween deck of No. 2 hold, employing a second hilo. The ship had a ventilating system often used when hilos were working in the holds, which was not turned on on the day in question prior to plaintiff's injury. It was raining and a hatch tent partly covered the upper hatch opening. The hatch between the 'tween deck and the lower hold was partly covered with hatch boards. I.T.O. had portable blowers at the pier, none of which were in use at No. 2 hold. There was evidence that at about 10 or 15 minutes after the second gang entered the hold, men complained of fumes

from the hilos and the winch operator and signalman at the hatch asked a ship's officer to turn the blowers on. There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed sometime between 11:15 and 11:30 A.M., the blowers had not been turned on and the men left the hatch."

Upon retrial, the shipowner introduced into evidence the complete record of the prior trial including the stenographer's minutes to establish the basis upon which it had been held liable to the plaintiff and read into the record from testimony taken before trial of the stevedore's pier superintendent, Joseph Jerkovich, to evidence that the stevedore was in complete control, and had complete supervision, of all operations involved in the loading of the cargo on board the shipowner's vessel (Appellant's Appendix, 46a-47a, 49a-51a, 53a-60a, 66a). This testimony also established that the hilos, one of which had been placed first in the lower hold and the other later in the after half of the 'tween deck of the vessel, were owned and controlled by the stevedore, and that all of the persons engaged in the operation of loading the vessel including the longshoremen, the hilo drivers and all supervisory personnel were employees of the stevedore (Appellant's Appendix 47a, 49a-52a, 136a). It established also that the stevedore owned and controlled a large number of portable blowers which were kept at the pier where the vessel was being loaded and that when hilos were being used in the holds of vessels, these portable blowers were supposed to be put on board to exhaust fumes from the holds; and also that there was maintained in the office of the stevedore's superintendent instruments for measuring the carbon monoxide content of the atmosphere in the holds, which the stevedore's supervisory employees, specifically the ship's superintendents who were in charge

of the stevedore's operations on the vessels, had been instructed to use where hilos were being employed, and if the content in the atmosphere required, to put additional blowers into operation (Appellant's Appendix 54a-57a, 59a, 60a). There was no dispute as to this evidence.

The third-party defendant-stevedore on its case read from the deposition taken before trial of the vessel's chief officer and called as a witness one Joseph P. Van Daalen, a shoreside employee of the shipowner. The substance of all of this testimony was merely that the ship was equipped with a cargocaire system which could have been used to clear the atmosphere in the holds and, although primarily designed for the care of cargo at sea, was sometimes used when hilos operated in the holds, and that neither of them had observed any accumulation of smoke in the hold during the morning or had heard of any complaints from the longshoremen (Appellant's Appendix 95a, 101a, 104a, 107a-108a, 111a, 114a, 141a, 142a). The only other testimony introduced by the third-party defendant was that of Rudolph Curko, the working hatch boss of the gang which put the second hilo in operation in the after half of the 'tween deck at 10:45 a.m. He testified as to the request to the mate to put the ship's blowers in operation at approximately 11 a.m. after complaints were made by the men of smoke and fumes in the hold (Appellant's Appendix 129a-131a, 133a-136a). This testimony was substantially identical with that given by him at the first trial. This is all the testimony that was introduced at the retrial, and there was no dispute as to any of it, except for some testimony given by Jerkovich on his pretrial deposition as an adverse party, which the third-party defendant was allowed to read over objection by counsel for the shipowner, to the effect that at some uncertain time during the morning of the accident, he saw blowers in use at the No. 2 hold. This testimony had been excluded at the first trial and was inconsistent with the uniform testimony at that trial upon which the shipowner had been held liable to the plaintiff

as noted by the Court of Appeals in its decision below (392 F. 2d at p. 764-5, Appendix to Petition, 31a).

It is not true as said by Petitioner (p. 6 of the petition) that there was undisputed testimony that up until approximately 11 a.m. the working conditions in the hold were good. The only testimony was to the effect that there was no observable smoke in the hold prior to 10:45 when the second hilo was put into operation. The injury producing element here was not smoke but carbon monoxide whose pernicious characteristic is that it is both colorless and odorless.

It is a gross misstatement of the shipowner's position (as stated in the Petition at p. 8) that the basic argument advanced by the shipowner at the trial was that the stevedore breached its implied warranty of workmanlike service in complying with the mate's orders and continuing to work in reliance on the mate's assurances that he would turn on the ship's blowers. *Per contra,* it is, and it has always been the shipowner's contention, that the stevedore cannot be exonerated from the breach of its implied warranty in creating an unsafe condition in the hold by the use of its hilos and in continuing to work its men when it knew or should have known that conditions were unsafe without taking any of the means available to it to keep conditions in the hold safe, by the belated request to the mate to put on the ship's blowers only after its workmen had begun to complain of the smoke and fumes in the hold, in reliance upon the shipowner to do what was its own prime duty.

Argument

I.

There is no Seventh Amendment Constitutional question involved in this case.

It has long been settled by this Court that the Federal Courts have not only the power but the duty to direct judg-

ment in favor of one party or the other where the facts are undisputed and there are no conflicting inferences, *Herron* v. *Southern P. Co.*, 283 U. S. 91.

In that case, this Court held that a provision of a State Constitution providing that the defense of contributory negligence or of assumption of risk shall in all cases be a question of fact, and shall at all times be left to the jury, could not impair the power of a Federal Court to direct a verdict in favor of the defendant where plaintiff's contributory negligence was established as a matter of law, saying that in such an instance "The judge has the right and duty to direct a verdict for the defendant", citing a host of prior cases.

In *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, the Trial Court had reserved decision on a motion for directed verdict and subsequently denied the motion. Upon appeal to the Circuit Court of Appeals, that Court held the evidence insufficient to sustain the verdict and reversed the judgment with a direction for a new trial. This Court granted certiorari to pass upon the question whether under the Seventh Amendment, the Circuit Court had the power and duty because of insufficiency of the evidence to direct judgment instead of remanding for a new trial, and specifically held that the Seventh Amendment preserved the common law powers of an Appellate Court to set aside a verdict not supported in law and required the Court to direct a verdict where required by law instead of remanding for a new trial.

In *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, this Court pointed out that Rule 50 (b) of the Federal Rules of Civil Procedure was enacted in conformity with the Seventh Amendment and preserved "the right of either party to have a question of law reserved upon the decision of which the Court might enter judgment to one party in spite of verdict in favor of the other" and merely rendered

unnecessary "a request for reservation of a question of law" (p. 250).

As recently as 1960 in a F.E.L.A. case, this Court, *per curiam*, reversed a decision of the Court of Appeals affirming a judgment in favor of a plaintiff against a defendant, and directed judgment on defendant's motion for a directed verdict and for judgment n.o.v. because of insufficiency of the proof to establish defendant's negligence, *New York, N.H. & H.R. Co.* v. *Henagan*, 364 U. S. 441.

In *Mosley* v. *Cia. Mar. Adra, S.A.*, 362 F. 2d 118, the Court of Appeals for the Second Circuit affirmed a judgment n.o.v. in favor of the shipowner against the stevedore who "furnished and rigged" the injury producing instrumentality, "and controlled all other relevant aspects of the loading", upon the ground that "the jury would have to find that the stevedore company was liable for a breach of its warranty of workmanlike service" (*id.* p. 122). Certiorari was sought in that case upon the same ground as here advanced that the judgment n.o.v. deprived the stevedore of the Seventh Amendment guarantee of jury trial. This Court denied certiorari *sub nom., Lipsett Steel Products* v. *Samuel Mosley et al*, 385 U. S. 933.

The Court of Appeals in reversing the judgment in favor of the stevedore in the case at bar, did not attempt to reweigh the evidence, or to substitute its conclusions or inferences from the facts for those of the jury, as suggested by Petitioner. As is quite apparent from the Opinion, the decision of the Court of Appeals is based specifically upon the ground that under the evidence and under the law, no jury question was presented and the shipowner was entitled to judgment against the stevedore as a matter of law (Appendix to Petition, 30a-31a).

Petitioner appears to argue that since the Court of Appeals did not direct judgment in favor of the shipowner on the first appeal but remanded the third-party case for

a new trial, it thereby held that as a matter of law there was a jury determinable issue as between the shipowner and the stevedore. In so arguing, Petitioner fails to recognize that since the Court of Appeals on the first appeal had also remanded the plaintiff's case against the shipowner for a new trial because of error in the charge, it necessarily had to remand the third-party action for retrial since the question of the shipowner's right to indemnity could only be determined within the context of any liability imposed upon the shipowner on retrial of plaintiff's case. *Washington Gaslight Co.* v. *District of Columbia,* 161 U. S. 316, 331 *et seq.; Fatovic* v. *Nederlandsche-Ameridaansche Stoomvaart,* 275 F. 2d 188; *Mosley* v. *Cia. Mar. Adra, S. A.,* 314 F. 2d 223, cert. den. 375 U. S. 829; *Caputo* v. *U. S. Lines Company,* 311 F. 2d 413, cert. den. *sub nom., Imparato Stevedoring Corp.* v. *United States Lines Company,* 374 U. S. 833.

On the first appeal, the Court of Appeals had held erroneous (346 F. 2d 484) the charge of the Trial Court to the jury to the effect that if the jury should find that complaints were made to the ship's officer as soon as the dangerous condition was known or should reasonably have been known by the stevedore, and that the ship's officer directed the longshoremen to continue working, with the added assurance that the dangerous condition would be promptly eliminated, then the shipowner is not entitled to recover indemnity (Appellant's Appendix, 230a). Although this Court granted the plaintiff's petition for certiorari and reinstated the verdict in favor of the plaintiff, it denied the stevedore's petition for certiorari, 382 U. S. 283. Subsequent petitions by the stevedore for rehearing of its petition for certiorari were also denied by this Court, 382 U. S. 1030; 384 U. S. 994. Petitioner is now again seeking a review on certiorari of a question which this Court has already three times refused to review.

There was no new or additional evidence on this phase of the case (Opinion below, Petitioner's Appendix, 32a)

The special interrogatories addressed by the Court to the jury on the retrial related solely to these complaints to the ship's officer and his response thereto (Appendix to Appellant's Brief, 235a). The issue as to the effect thereof had already been precluded by the Court of Appeals' decision on the first appeal, certiorari to which has been denied by this Court. On the general issue as to the stevedore's breach of warranty of workmanlike service, only a general verdict was taken. Petitioner's heavy reliance upon *Atlantic and Gulf Stevedores* v. *Ellerman Lines*, 369 U. S. 355, is entirely misplaced. In that case this Court did not hold that under no circumstances could a judgment of directed verdict be given in favor of the shipowner against the stevedore. There were two bases of liability upon which the ship, under the charge, might have been held at fault either for unseaworthiness or negligence, in either of which instance this Court indicated that the Circuit Court's decision granting a directed verdict in favor of the shipowner against the stevedore would have been justified. It was only the third possible ground of liability for unseaworthiness, namely, the defective bands which secured the bales of burlap, a condition not known to the stevedore, which this Court held could reconcile the jury's verdicts in favor of the plaintiff against the shipowner, and against the shipowner in favor of the stevedore. Here there is no question of reconciling the jury's verdict.

Equally misplaced is Petitioner's reliance upon *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563. In that case after the rendition by the jury of a verdict in favor of the injured plaintiff against the shipowner, the District Court had directed a verdict in favor of the third-party defendant stevedore against the shipowner on the issue of indemnity upon the ground that the jury's verdict against the shipowner precluded a verdict in favor of the shipowner against the stevedore. The plaintiff had been injured by the falling of a timber from a winch shelter which had been erected on the vessel in New York and

had been made available by the shipowner to the stevedore during unloading of the vessel in Boston. This Court merely held that the jury's finding of negligence on the part of the shipowner did not preclude the shipowner from having indemnity from the stevedore, since under one theory upon which the shipowner could have been held at fault under the Court's charge, there was a fact issue on the shipowner's right to indemnity under appropriate instructions. That is not the case here.

All that is involved here is whether under the undisputed evidence in this case any verdict could properly have been brought in by a jury other than one in favor of the shipowner since, as stated by the Court of Appeals in its opinion herein, the stevedore not only knew of the dangerous condition but had actually created it, and had means available to ascertain the condition and to correct it, but used neither and allowed conditions to become unsafe while it continued to work the men.

Indemnity must be determined upon the bases upon which the shipowner was originally held liable to the plaintiff, and the verdict against the shipowner on the first trial is binding upon the stevedore as well as the shipowner to the full extent of all facts necessarily found by the jury upon which the shipowner's liability depended, *Washington Gaslight Co.* v. *District of Columbia, supra; Caputo* v. *United States Lines Company, supra.*

The bases upon which the jury was allowed to bring in a verdict against the shipowner at the first trial were: 1) unseaworthiness of the hold, because the accumulation of noxious fumes from the exhaust of the hilos working in the hold rendered the hold unfit and unsafe; 2) that the shipowner was under an obligation to provide the plaintiff with a safe place to work and, accordingly, would be liable in negligence if the shipowner either knew or as "a reasonably prudent person should have known that an enclosed work space was unsafe after a substantial work period with

gasoline powered engines in the absence of ventilation'' (Appellant's Appendix, 229a). The Court of Appeals on the first appeal had held that this was error (Appendix to Petition, 5a), but this Court, on the petition for certiorari of plaintiff, summarily reversed and directed the reinstatement of plaintiff's verdict, 382 U. S. 283.

Obviously, if the shipowner was chargeable with constructive knowledge under the charge in the principal case, so also was the stevedore who was in charge of the work, who owned the hilos, placed them in the hold, controlled the men, had means for ascertaining the conditions of the atmosphere which its supervisory personnel were charged by it with employing for such purpose, and who also had the means for clearing the atmosphere, which means the supervisory employees were also charged by it to employ (Cf. *Washington Gaslight Co.* v. *District of Columbia, supra*). Under such circumstances, having created the condition and continued to work its men without correction of the condition, the stevedore as a matter of law could not escape liability under the principles of maritime indemnity laid down by the decisions of this Court from *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Co.*, 350 U. S. 124 (1955) through *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964), as said by the Court below in its opinion (Appendix to Petition, 32a-33a).

In *Italia Societa,* reviewing its earlier decisions, this Court held that the stevedore is liable for indemnity even though it has no knowledge of the unsafe condition if it is in fact created by the tools and appliances which it, the stevedore, brings aboard and that the stevedore's liability, being in warranty, does not depend upon negligence concepts of the exercise of reasonable care. Thus, there could be no legal basis upon which a jury could find that the stevedore had not breached its warranty of workmanlike performance.

The verdict of the jury in favor of the stevedore on the retrial was precipitated by unfortunate errors of the District Court: 1) in improperly admitting into evidence Section 9.93 of the Safety and Health Regulations for Longshoring (29 C.F.R. Sec. 9.1 *et seq.*, renumbered as of January 1, 1964, 1504.1 *et seq.*),* which are inapplicable as to shipowners (Petitioner's Appendix, 6a, 346 F. 2d 484, cert. granted, 382 U. S. 283), and in charging that the jury could take these regulations into consideration as between the shipowner and stevedore (Appellant's Appendix, 182a); 2) in admitting into evidence the contract between the shipowner and the stevedore and in charging the jury that they could take into consideration a provision of that contract requiring the stevedore to advise the shipowner immediately of any hazardous conditions which require remedy (189a), as if this could affect the stevedore's law-implied warranty (Cf. *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 336 F. 2d 124 (CA 9, 1964), cert. den. 379 U. S. 973), which was the import given to the contract in defendant-stevedore's summation (Appellant's Appendix, 172a); and 3) in charging the jury that if they found the facts to be as testified to by Curko, they must bring in a verdict for the defendant-stevedore (Appellant's Appendix, 192a), which was contrary to the law of the case as established on the first appeal (346 F. 2d 481, 484; cert. den. 382 U. S. 283).

To all of these errors exception was taken at the trial and urged on the appeal to the Court below. But these

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*Section 9.93

VENTILATION AND ATMOSPHERIC CONDITIONS

(a) When internal combustion engines exhaust into the hold or intermediate deck, and neither natural ventilation nor the ship's ventilating system is adequate to keep the carbon monoxide content of the atmosphere in the hold or intermediate deck below 100 parts per million, the employer shall use blowers sufficient in size and number and so arranged as to do so. The intakes of blowers shall be adequately guarded by screens.

errors, of course, became moot by reason of the decision of the Court of Appeals, properly so, that the verdict could not stand as being contrary to law.

II.

The decision below is not in conflict either with decisions of this Court, or of other Courts of Appeal.

The contention of conflict with the decisions of this Court in *Weyerhaeuser SS Co.* v. *Nacirema Operating Co.,* 355 U. S. 563 and *Atlantic and Gulf Stevedore* v. *Ellerman Lines,* 369 U. S. 355 and with the decisions of the Courts of Appeals in other Circuits denying indemnity in particular instances, was the subject of the stevedore's petition for certiorari from the first decision of the Court of Appeals in this case, and was therein extensively argued both by the Petitioner and the shipowner. That petition was denied by this Court (382 U. S. 283). Subsequent to the granting by this Court of certiorari to the plaintiff in this case and the reinstatement of plaintiff's judgment, the Petitioner moved for rehearing of the order denying its petition for a writ of certiorari upon the ground that, having obtained a jury verdict in its favor on the original trial, the petition for certiorari from the reversal by the Court of Appeals of the judgment in its favor should be granted by this Court for the reasons contained in its original petition. This petition was also denied (382 U. S. 1030).

When a petition for writ of certiorari to the Court of Appeals for the Fifth Circuit was filed in this Court in the case of *Waterman Steamship Corporation* v. *David,* 353 F. 2d 660 (1965), a motion was made by the Petitioner herein for leave to file a second petition for rehearing of the order of this Court denying its original petition herein upon the ground of conflict between the decision of the Fifth Circuit in the *Waterman* case and the decision

of the Court of Appeals for the Second Circuit herein. This motion was also denied by this Court (384 U. S. 994). This is now the fourth attempt to have this Court review the decision of the Court of Appeals herein as to what constitutes indemnity precluding conduct upon the ground of conflict with the decisions of this Court in *Weyerhaeuser* and *Atlantic and Gulf* and the decisions of the Courts of Appeal of the other circuits. The subject would seem to have been pretty well exhausted by this time. This Court's decision in *Weyerhaeuser* makes it eminently clear that the only type of conduct which can preclude indemnity is such as prevents or hinders the performance by the stevedore of his warranty of workmanlike service. Thus, in that case, in holding that the shipowner would be entitled to indemnity even though the shipowner was, itself, negligent and had provided the unsafe equipment out of which the injury arose unless it was chargeable with conduct "sufficient to preclude recovery" this Court cited in footnote 6 at 355 U. S. page 567, *Corbin on Contracts,* Sections 571, 947 and 1264, and *Restatement of Contracts,* Sections 295 and 315. These citations leave no doubt that the type of conduct to which reference was made was, as held by the Court of Appeals on the first appeal herein, such "That it must at least prevent or seriously handicap the stevedore in his ability to do a workmanlike job" (346 F. 2d at p. 484, Appendix to Petition p. 7a).

Petitioner fails to note that *in not a single case cited as being in conflict with the decision herein was the unsafe condition created by the stevedore,* as was the situation here.

Petitioner's analysis of the decision of the Court of Appeals for the Fourth Circuit in *Moore-McCormack Lines, Inc.* v. *Maryland Ship Ceiling Co.,* 311 F. 2d 663, gives a completely distorted view of the case by eliminating the controlling factual elements upon which the decision in that case was based. In that case the jury found that the presence of hydrogen cyanide gas in the cargo

loaded at a prior port was such a latent or hidden danger as is not usually encountered by an expert and experienced ship ceiler, but was a condition of which the shipowner knew, or by the exercise of ordinary care should have known, and was not such a condition as the ship ceiling company by the exercise of reasonable care should have discovered. It was on the basis, and only on the basis of these specific findings of the jury, that the Court in that case sustained a verdict in favor of the ship ceiling company on the claim for indemnity. The principles applied by the Court in that case are in precise accord with the principles governing indemnity defeating conduct stated with a wealth of supporting authority in *Hugev* v. *Dampskisaktieselskabet International,* 170 F. Supp. 601, 610-611, aff'd *sub nom. Metropolitan Stevedore Co.* v. *Dampskisaktieselskabet International* (C. A. 9), 274 F. 2d 875, cert. den. 363 U. S. 803, cited by this Court in *Italia Societa* v. *Oregon Stevedoring Co.,* 376 U. S. 315, 323, footnote 9.

The other cases cited by Petitioner as being in conflict with the decisions of the Court of Appeals herein, viz., *Hudson Steamship Co.* v. *Colon,* 314 F. 2d 44 (C. A. 1); *Thompson* v. *Trent Maritime Co.,* 353 F. 2d 632 (C. A. 3); *Hodgson* v. *Lloyd Brasileiro Patrimonio Nacional,* 294 F. 2d 32 (C. A. 3); *Compania Anonima Venezolano de Navegacion* v. *Matthews,* 371 F. 2d 971 (C. A. 5); *Waterman Steamship Corporation* v. *David,* 353 F. 2d 660; *United States* v. *Harrison,* 245 F. 2d 911 (C. A. 9), all involve defects in the ship's hull or equipment where the stevedore was either given express assurance by the ship that the equipment was in a safe condition for use as in *Hudson, Hodgson* and *United States* v. *Harrison* or implied assurance thereof as in *Waterman,* or the shipowner neglected or refused to correct a condition which was its responsibility as in *Thompson* and *Compania Anonima.*

In all of these cases as in *Weyerhaeuser,* the question involved was whether the stevedore was liable in indemnity in continuing to work after a discovery of an unsafe con-

dition which had originally been created not by the stevedore but by the shipowner.

In the present case, we have on the contrary a condition of the longshoremen's work area created by instrumentalities provided by the stevedore, the effects of which were either known, or should have been known, to the stevedore, the testing of the harmful effects of which was a prescribed obligation imposed by the stevedore upon its supervisory personnel on board the ship, and for the prevention of which harmful effects the stevedore maintained preventive means in the way of portable blowers which, according to its prescribed procedures, were always and without variation supposed to have been placed at hatches every time a hilo was employed in a hold.

To argue that a belated request by subordinate employees to a mate to put on the ship's forced ventilating system within 15 minutes prior to the time that plaintiff was overcome by the carbon monoxide fumes and after they must already have had injurious effects, creates an issue of fact as to whether the shipowner prevented or hindered the stevedore in the performance of its warranty of workmanlike service, is manifestly unsound. If a stevedore could so escape the effect of a clear breach of its warranty, the warranty would be meaningless. It is submitted that as a matter of law, such evidence was insufficient to create a jury question whether the shipowner was chargeable with conduct precluding indemnity.

The contention that the decision of the Court of Appeals below is in conflict with its own earlier decision in *McNamara* v. *Weichsel Dampfschiffahrts AG Kiel, Germany*, 339 F. 2d 475, is completely fallacious. That case involved numerous fact issues as to whether or not the persons who were operating the winch, who were employees of the shipowner and had been borrowed by the stevedore, were incompetent for the performance of such service, and whether or not they were, in the performance of the service, acting

as the servants of the shipowner or of the stevedore, and also whether the accident was due to faults on their part or fault on the part of the chief mate of the ship who took over the giving of signals to the winchman from the stevedore's employee. All of these questions were sharply disputed as issues of fact. The Circuit Court reversed a verdict in favor of the shipowner against the stevedore because of error in the instructions to the jury. On the retrial, these fact issues were submitted to a jury and again resulted in a verdict in favor of the shipowner against the stevedore, although the shipowner's negligent conduct had on the first trial been held to be a proximate cause of the injury. The Court had no difficulty whatever in affirming the judgment in favor of the shipowner against the stevedore, holding that the shipowner's negligence did not preclude indemnity, citing *Italia Societa* and *Weyerhaeuser* (339 F. 2d 475, 478). That was the issue of law involved in that case, and the Court's ultimate decision thereon is entirely consistent with the decision below in the case *sub judice.*

Conclusion

What this petition really seeks, under false guises, is a review and relaxation by this Court of the law of maritime indemnity as consistently enunciated by this Court beginning with *Ryan* v. *Pan Atlantic S.S. Co.,* 350 U. S. 124 (1955), running through *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.,* 355 U. S. 563 (1958); *Crumady* v. *J. H. Fisser,* 358 U. S. 423 (1959); *Waterman S.S. Corp.* v. *Dugan & McNamara Inc.,* 364 U. S. 421 (1960) and culminating in *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.,* 376 U. S. 315 (1965), upon the plea that the economic burden which has been placed upon stevedores by these decisions has driven the majority of stevedoring companies out of business, and "to leave surviving only those few who possess an infallible degree of expertise, or a willingness, backed by sufficient wealth, to become an insurer" (Petition, p. 24). This is sheer nonsense.

It is a known fact that it is the practice of the stevedoring industry to add insurance charges for workmen's compensation and legal liability insurance on to the charges which it imposes upon shipowners for its services. Ultimately, it is the shipowner and not the stevedore who pays the mounting insurance costs. The consolidation of stevedore companies into a fewer number of large companies possessing greater competence and efficiency and the means to take advantage of developing technological improvements has been common within the past generation to all industries. With particular reference to the maritime industry in the Port of New York, the consolidation into fewer, larger and more efficient companies has occurred not only in the stevedoring industry, but also in the towboat industry and lighterage industry. When, during the tugboat strike of 1946, President Truman requisitioned all tugboats in New York harbor, the order of requisition went out to approximately 100 companies. There are today in New York harbor about seven towboat companies of any responsible size, and only about a handfull of independents. In the lighterage industry, there are left remaining out of a score of companies probably less than a half dozen.

To state that the consolidation of the stevedore industry in the Port of New York from a large number of small independent companies into a fewer number of large responsible companies is, as said by the Petitioner, "responsive to the death knell tocsin of the judiciary" is as lacking in good taste as it is in accuracy.

The petition should be denied.

Respectfully submitted,

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Juvenal L. Marchisio,
On the Brief.

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 379

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

v.

N. V. NEDERL. AMERIK STOOMV. MAATS.,
Respondent.

MOTION FOR RECALL OF JUDGMENT

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 379

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

v.

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent.

MOTION FOR RECALL OF JUDGMENT

Respondent, N. V. Nederl. Amerik Stoomv. Maats., hereby moves this Court for recall of the certified copy of the judgment of this Court, dated October 21, 1968 in the above entitled cause from the United States District Court for the Southern District of New York and for amendment of the judgment to provide for remand of the case to the United States Court of Appeals for the Second Circuit for the reasons set forth in the Petition hereto annexed.

Dated: New York, N. Y., November , 1968.

EDMUND F. LAMB,
Attorney for Respondent,
N. V. Nederl. Amerik Stoomv. Maats.,
Office and P. O. Address,
80 Broad Street,
New York, New York 10004.

Petition in Support of Motion

The petition of N. V. Nederl. Amerik Stoomv. Maats. in support of the motion hereto annexed respectfully shows:

1. By its decision herein dated October 21, 1968, this Court granted the petition for certiorari of International Terminal Operating Co., Inc., to review a judgment of the United States Court of Appeals for the Second Circuit entered on April 12, 1968, which reversed a judgment of the United States District Court for the Southern District of New York entered on May 3, 1967. The decision of this Court at the same time reversed the judgment of the United States Court of Appeals. The decision of this Court is reported at 21 L. Ed. 2d 58.

2. The decision of this Court, however, did not reinstate the District Court's judgment in favor of the petitioner dismissing respondent's third-party action for indemnity.

3. The judgment of this Court dated October 21, 1968, which was transmitted to the Clerk of the United States District Court for the Southern District of New York on November 15, 1968, and which has been filed and docketed in that Court on November 19, 1968 recites "that this cause be, and the same is hereby, remanded to the United States District Court of the Southern District of New York for further proceedings in conformity with the opinion of this Court."

4. It is respectfully submitted that the certified copy of the judgment of this Court forwarded to the Clerk of the United States District Court for the Southern District of New York on November 15, 1968 should be recalled, and that the judgment should be amended to provide for a remand of the case to the United States Court of Appeals

for the Second Circuit "for further proceedings in conformity with the opinion of this Court", for the following reason:

On respondent's appeal to the United States Court of Appeals for the Second Circuit from the judgment in favor of petitioner dismissing its third-party complaint for indemnity, respondent, as appellant in that Court, raised the issue on appeal that the verdict should be set aside and a new trial granted because of error in the admission of evidence and in the charge to the jury in three respects, as pointed out in respondent's brief in opposition to the petition for certiorari herein at p. 14:

> i. in improperly admitting into evidence Section 9.93 of the Safety and Health Regulations for Longshoring (29 C.F.R. Sec. 9.1 et seq., renumbered as of January 1, 1964, 1504.1 et seq.), which are inapplicable as to shipowners under Secs. 9.2 and 9.3(c), and in charging that the jury could take these regulations into consideration as against the shipowner and in favor of the stevedore.
>
> ii. in admitting into evidence the contract between the shipowner and the stevedore and in charging the jury that they could take into consideration a provision of that contract requiring the stevedore to advise the shipowner immediately of any hazardous conditions which require remedy (189a), as limiting the stevedore's law-implied warranty of workmanlike service.
>
> iii. in improperly charging the jury that if they found the facts to be as testified to by the stevedore's hatch boss, they must bring in a verdict for the defendant-stevedore.

Since the Court of Appeals reversed the judgment as a matter of law, it never came to a consideration of these questions.

5. Since this Court has not by its decision herein reinstated the verdict in favor of petitioner, the remand "for further proceedings", it is submitted, should be directed to the United States Court of Appeals for the Second Circuit so that they may pass upon these undecided questions. 28 U.S.C. § 2106. This, it is submitted, is in conformity with the practice followed by this Court in *Pasquale Palermo, Petitioner* v. *Luckenback Steamship Company*, 355 U. S. 910 (No. 350).

WHEREFORE, it is prayed that respondent's motion to recall the certified copy of the judgment herein sent to the United States District Court for the Southern District of New York be granted, and that the judgment entered herein on October 21, 1968 be amended to provide for a remand of the case to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

N. V. NEDERL. AMERIK STOOMV. MAATS.

By: EDMUND F. LAMB,
Atty. for Respondent.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

INTERNATIONAL TERMINAL OPERATING CO., INC. *v.* N. V. NEDERL. AMERIK STOOMV. MAATS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 379. Decided October 21, 1968.

PER CURIAM.

The petition for a writ of certiorari is granted.

The respondent, a shipowner, sought indemnity from the petitioner, a stevedoring company, for damages the shipowner had paid to an employee of the stevedore who was injured while working aboard the respondent's ship. See *Albanese* v. *N. V. Nederl. Amerik Stoomv. Maats.*, 382 U. S. 283 (1965). A jury found that the stevedoring company had fulfilled its duty of workmanlike service and, accordingly, that no indemnity was due. See *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956). The Court of Appeals reversed this verdict and held, as a matter of law, that the stevedore had not taken reasonable action to avert the injury. 392 F. 2d 763 (1968).

The cause of the longshoreman's injury was carbon monoxide inhalation that occurred as he and other longshoremen were using gasoline-powered vehicles to move cargo in the ship's lower hold. The shipowner contends that the stevedore's hatch boss acted unreasonably. When longshoremen complained about the lack of ventilation in the hold, the hatch boss informed one of the ship's officers that his men would walk off the job unless the officer turned on the ship's ventilating system. The officer told the men to continue working and promised to activate the ventilating system, which was within the

shipowner's exclusive control and which was concededly adequate to ventilate the hold. When, less than 10 minutes later, the hatch boss realized that the ventilating system had not been turned on, he ordered the men from the hold. The injured longshoreman collapsed as he was ascending a ladder to leave.

The Court of Appeals said that the hatch boss should have ceased work when he first learned that the ship's ventilating system was not operating, despite the officer's promise to turn on the system. Alternatively, he should have used the stevedore's blowers, which had been left on the pier, to ventilate the hold. The jury, however, in response to a special interrogatory, found that the stevedore had acted reasonably in continuing to work for a brief period in reliance on the officer's promise. We cannot agree with the Court of Appeals that the stevedore acted unreasonably as a matter of law. Under the Seventh Amendment, that issue should have been left to the jury's determination. Any other ruling would be inconsistent with this Court's decision in *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines Ltd.*, 369 U. S. 355 (1962).

The judgment of the Court of Appeals is

Reversed.